No. 332 SUPREME COURT, U.S.

Office - Supreme Court, U.S.
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APR 17 1958
JOHN T. FEY, Clerk

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,919

WESLEY D. WHITE, DOCTOR R. WINTER, HERBERT B. HAMMOND, JAMES WILLIAMS, CHRISTOPHER WRIGHT, EDGAR W. PITTS, JOSEPH A. MURRAY, and GEORGE R. PHILLIPS,

Appellants,

v.

CHARLES S. THOMAS and WILBUR M. BRUCKER,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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For the
District of Columbia Circuit
FILED

QUESTIONS PRESENTED

1. Does a single district judge exceed his authority, as limited by 28 US Code, Sec. 2284, by dismissing a suit instituted by federal employees to enjoin the enforcement and operation of Section 12 of the Veterans Preference Act of 1944 on the ground that it is repugnant to the Fifth Amendment of the Constitution of the United States?

2. Is Section 12 of the Veterans Preference Act of 1944 repugnant to the due process clause of the Fifth Amendment to the Constitution of the United States for the reason that it sets up an absolute right of retention in federal employment, thereby arbitrarily discriminating against the plaintiffs, non-veteran government employees, by eliminating any consideration of the relative merits of competing employees?

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CHARLES S. THOMAS and WILBUR M. BRUCKER,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The suits were instituted in the Court below claiming rights arising under the Fifth Amendment to the Constitution and amounts in controversy exceeding three thousand dollars (J.A. 1, 5, 12, 17). This is an appeal from a final judgment of dismissal, of which jurisdiction is granted to this Court by Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

The suits below were instituted by the plaintiffs, who claimed injunctive relief against the injury threatened to them by the application

of Section 12 of the Veterans' Preference Act of 1944 (Act of June 27, 1944, ch. 287, 58 Stat. 387, as amended, 5 USC Sec. 861), which statute they alleged to be void as violating the due process clause of the Fifth Amendment. The cases were argued together and were consolidated in the Court below (J. A. 31).

All of the appellants are employed as civilian employees in military and naval establishments. All have civil service status.

White is a pipefitter at the Charleston Naval Shipyard (JA 1). He has been employed by the government since 1939 (JA 1). Although he was drafted into the Navy and inducted (JA 2), he was immediately furloughed so that he could remain at his work at the Navy installations in Pearl Harbor (JA 2). He has not been issued a reduction in force notice (JA 28), but has been placed upon a retention register so that he will be discharged before any employee in the same class of work who has veterans' preference (JA 2, 4).

Winter has been continuously employed at the Charleston Naval Shipyard since March 2, 1935 (JA 23), during which time he has continuously received "satisfactory" ratings, except for one efficiency rating of "very good", and five of "excellent" (JA 6). On April 3, 1956, a notice of dismissal was issued to Winter because of a proposed reduction in force (JA 23). Subsequent to the institution of this suit, Winter was placed in a lower wage category (JA 23). There were fifteen competing employes whose retention privileges exceed Winter's only because of the requirements of the Veterans' Preference Act (JA 24).

Herbert B. Hammond was initially employed at the Charleston Naval Shipyard on April 28, 1936 (JA 25). During his entire service, Hammond has received performance ratings of "Satisfactory" or better, twelve of such ratings being "Very good" (JA 7). On April 3, 1956, Hammond was issued a separation notice because of the proposed reduction in force. At that time, there were four employees whose retention

rights were superior to Hammond's only because of the provisions of the Veterans' Preference Act (JA 25). Hammond's reduction in force notice was subsequently cancelled because a competing employee retired (JA 25).

James Williams was continuously employed as a laborer at the Charleston Naval Shipyard from May 1, 1935 (JA 25). On April 10, 1956, he received a separation notice because of a reduction in force (JA 25), at the time of which, there were thirty-six competing employees whose names appeared above his on the retention register due to veterans preference (JA 26). After the institution of this suit, Williams' reduction in force notice was cancelled (JA 26).

Christopher Wright was initially employed at the Charleston Naval Shipyard as a laborer, on April 20, 1933, and, at the time of the institution of the suit, was a Helper Machinist (JA 26). On April 10, 1956, he received a notice of separation, at the time of which there were thirty-six employees who had superior retention rights due to veterans preference (JA 26). After the institution of this suit, Wright's notice of separation was cancelled (JA 26).

George R. Phillips was employed at the New York Naval Shipyard, where he had been employed since August, 1936 (JA 20). On February 24, 1956, he received notice of his proposed separation because of a reduction in force (JA 27). However, he was not discharged, but was reduced in rank and pay (JA 27).

Joseph A. Murray was employed as a Filer at the Springfield Armory, where he had eighteen years and ten months seniority (JA 13). He claims that there are thirty persons whose retention rights exceed his only because of the provisions of Section 12 of the Veterans' Preference Act (JA 13). It is admitted that at least eight persons have retained their jobs because of the provisions of the Act (JA 16). Murray was separated on April 27, 1956 (JA 16).

Edgar W. Pitts was employed as a Machining Inspector (JA 13) at the Springfield Armory. In the course of a reduction in force, he was separated on June 29, 1956 (JA 15). At the time of his separation, there were forty seven machining inspectors who were retained solely because of the provisions of the Veterans' Preference Act (JA 15, 31).

Each of the defendants admits (JA 4, 11, 16, 21) that the actions affecting plaintiffs' employment has occurred, and each admits that these actions are in accordance with a plan for reduction in force procedures in accordance with the Veterans' Preference Act. Each of the defendants asserts his right and intention to enforce the act.

The government moved to dismiss each of the cases, and these motions were heard and determined by the single judge of the District Court.

The Trial Court refused to summon a three-judge court (JA 30), held that there was no substantial issue of the constitutionality of the Act (JA 30), and dismissed all of the cases on the ground of failure to state a claim upon which relief could be granted (JA 30).

STATUTES INVOLVED

5 US Code, Sec. 861 (Act of June 27, 1944, ch. 287, Sec. 12, 58 Stat. 390):

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; Provided further, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non preference employees who have equal or lower efficiency ratings: * * *

28 US Code, Sec. 2282, Sec. 2284 (Act of June 25, 1948, ch. 646 Sec. 1, 62 Stat. 968):

> Sec. 2282. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.
>
> Sec. 2284. In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> * * * *
>
> (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. * * *

STATEMENT OF POINTS

1. The actions of the single district court judge in hearing and determining the defendants' motions to dismiss, or in the alternative, for summary judgment, and in entering a final judgment of dismissal were in excess of his statutory authority, and therefore erroneous.

2. The second provision of Section 12 of the Veterans' Preference Act is arbitrary and unreasonable and is therefore void because it violates the due process clause of the Fifth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. A single judge is, by the express provision of 28 US Code Sec. 2284, prohibited from hearing and determining motions for dismissal

or summary judgment, and is prohibited from entering a final judgment of dismissal, in cases required to be heard by a three judge court. Because the suits here under consideration sought injunctive relief against the operation and enforcement of Section 12 of the Veterans' Preference Act on the ground of the repugnance of that section to the Fifth Amendment, the case was one required by 28 US Code Sec. 2282 to be heard and determined by a district court of three judges. The single judge refused to summon a three judge court on the ground that the constitutional question was insubstantial. This action was erroneous because the addition of the express language of Sec. 2284 by the Judicial Code of 1948 altered the effect of the precedents on which he relied, and furthermore, because those precedents do not support his action. The question of the constitutionality of Section 12 has not been foreclosed by any decision of the Supreme Court. In the light of the increasing protection which is afforded to government workers by recent decisions of the Supreme Court, the attack on the Section as arbitrary cannot be regarded as clearly unsound.

2. While Congress has very broad power to control the conditions governing the conditions of employment of federal workers, its discretion is not unlimited. United States v. Lovett, 328 US 303; United Public Workers v. Mitchell, 330 US 75; Wieman v. Updegraff, 344 US 183; Slochower v. Board of Education, 350 US 551. One of the limitations on the power of Congress is found in the Fifth Amendment to the Constitution, which prohibits arbitrary discriminations. An arbitrary discrimination may be defined as one which has no valid reason. There is no valid reason for establishing an absolute retention right for veterans, irrespective of their competence, their length of service, or their skill, as contrasted with those of the non-veteran government employee who must be discharged in order that the veteran may be retained. Such an absolute preference is discriminatory. It injures the public service, and it is not justified from the point of view of the veteran or because of the acts or failures to act on the part of those who are injured by it. The fact of the discrimination against these plaintiffs is clear, as is the lack

of valid reason for such discrimination. The provision of the statute is therefore arbitrary and violates the due process clause of the Fifth Amendment.

ARGUMENT

I. The actions of the single district court judge in hearing and determining defendants' motions to dismiss, or in the alternative, for summary judgment, were erroneous because they violated the express provisions of 28 US Code Sec. 2284.

The action of the single district judge in entering a final judgment of dismissal was erroneous, because it was in violation of his statutory authority.

The express provisions of 28 US Code Sec. 2282 require that a suit seeking injunctive relief against the enforcement of an Act of Congress on the ground of repugnance to the Constitution be heard and determined by a district court of three judges. The suits in this case were precisely the type of suit for which the statute makes provision. Each of the plaintiffs showed that he was being injured or was threatened by injury in his employment by the operation and enforcement of the proviso of Section 12 of the Veterans' Preference Act which creates an absolute right of retention for an employee having veterans preference. Each of the plaintiffs sought injunctive relief against the operation and enforcement of the statute. Each premised his claim for relief on the assertion that the statute constituted an arbitrary discrimination against him, and therefore was repugnant to the provisions of the Constitution, specifically the due process clause of the Fifth Amendment.

This being the situation, the single judge was expressly deprived of authority to enter a determination for or against the plaintiffs. Title 28 US Code, Sec. 2284 expressly provides, 'A single judge shall not * * * hear or determine any * * * motion to * * * dismiss the action or enter a summary or final judgment."

The single judge did precisely what the statute forbids him to do. The reason advanced for his action was that the attack on the constitutionality of the challenged provision of the Veterans' Preference Act is unsubstantial. In support of his action, he cited Wick v. Southern Pacific Co., 231 F2d 130, 134, 135 (CA-9, 1956).

Prior to the enactment of the Judicial Code of 1948, the rule had been established that a three judge district court need not be convened if the attack on the constitutionality of the statute were really unsubstantial. California Water Service Co. v. City of Redding, 304 US 252; William Jameson & Co. v. Morgenthau, 307 US 171. Both of these cases were decided prior to the amendment to the judicial code which expressly denied the single district judge the power to hear and determine motions to dismiss or for summary judgment.

This express limitation on the power of the single judge was inserted by Congress when it knew that the rule permitting such an action on the ground that the constitutional attack was unsubstantial had been established by the processes of the common law. It would be idle to suppose that Congress inserted this provision without purpose, and the amendment by statute of the former rule is the only possible purpose for the enactment of the limitation of the power of the single judge. The enactment without exception prohibits the dismissal of a case by a single judge, if the statute is attacked on the ground of repugnance to the Constitution. Snyder's Drug Stores, Inc. v. Taylor, 227 F2d 162, 165 (CA-8, 1955). Two opinions of Circuit Courts, Wick v. Southern Pacific Co., supra, and Otten v. Baltimore & Ohio R. Co., 205 F 2d 58 (CA-2, 1953), have apparently ignored the effect of the change in the Judicial Code on the former power of the single district judge to dismiss a case asserting a constitutional challenge to the validity of an Act of Congress. However, a careful reading of those decisions shows that the single judge's dismissal was approved because the particular suits attacked not the statute but the interpretation which had been made Cf. William Jameson & Co. v. Morgenthau, supra.

It follows that the action of the single judge was in violation of the express direction of the statute, and was therefore erroneous. However, even under the former rule, his action would have been incorrect.

The test of substantiality, as it existed under the former rule, was stated by the Court in California Water Service Co. v. City of Redding, 304 US 252, 255:

> The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject.

Neither of these conditions exist in the present case. There is no decision of the Supreme Court in which that Court has passed upon the constitutional validity of the provisions of Section 12 of the Veterans' Preference Act. The lower court indicated that the decision in Hilton v. Sullivan, 334 US 323, in which the Civil Service Commission regulations were challenged as unauthorized by the statute, could be regarded as a determination of the validity of the Act itself. This interpretation of the decision in Hilton v. Sullivan, supra, is erroneous because it ignores the well established principle that the Court will not pass upon the constitutional validity of a statute unless the constitutional challenge is clearly raised by the framework of the pleadings and the evidence. Korematsu v. United States, 323 US 214, 222.

Furthermore, Hilton v. Sullivan, supra, must be examined in the light of the very considerable development which has occurred in the law with regard to the legal protection afforded to persons claiming injury to their interest in government employment. It has now been established that the power of Congress over government employment is not absolute. Prior to Hilton v. Sullivan, supra, the existence of such limitations had been indicated by the Supreme Court. In United States v. Lovett, 328 US 303, it had been held that the control of Congress over federal government employment was restricted by the Constitutional provisions

prohibiting bills of attainder. In United Public Workers v. Mitchell, 330 US 75, the Court stated that this authority on the part of Congress was limited by the due process clause, and that discrimination on the basis of race or religion would violate that clause. The full effect of these decisions has been made plain by more recent decisions of the Supreme Court. Wieman v. Updegraff, 344 US 183; Slochower v. Board of Education, 350 US 551.

In Wieman v. Updegraff, supra, at pp. 191, 192, the Court made the effect of its earlier decisions unmistakable:

> * * * in United Public Workers, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity though inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." 330 US at 100. See also In re Summers, 325 US 561, 571, 89 L. ed 1795, 1802, 65 S Ct 1307 (1945). We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. [Emphasis supplied]

This holding was reiterated and reinforced by Slochower v. Board of Education, 350 US 551, in which the Court prohibited the discharge of a public employee for an invalid reason. The decision placed the basis for the protection squarely within the due process clause. It said (350 US at p. 559):

> There has not been the "protection of the individual from arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process. Ohio Bell Tel. Co. v. Public Utilities Commission, 301 US 292, 302.

These decisions prevent any conclusion that an attack on the challenged section of the Veterans' Preference Act has been foreclosed by its prior decisions. Nor, as will be demonstrated, can it be said that the attack here presented is "obviously without merit". The undeniable discrimination against one class of employees of the government in favor of another is clearly arbitrary, and violates the due process clause.

The lower court was therefore in error, acting as a single judge, in dismissing the cases, because the statute expressly prohibits that action, and, because even under the former rule, there was no legal basis for the dismissal of the cases without summoning a three judge district court.

II. The second proviso of Section 12 of the Veterans Preference Act is arbitrary and unreasonable and is therefore void because it violates the due process clause of the Fifth Amendment to the Constitution of the United States.

The plaintiffs attack the validity of the second proviso of Section 12 of the Veterans' Preference Act of 1944, which creates an absolute right of retention on the part of the employee with veterans' preference.

This portion of the statute is as follows:

> * * * Provided further, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *

This section has been amended, pro tanto, by 5 US Code Sec. 2005, Act of September 30, 1950, ch. 1123, Sec. 6, 64 Stat. 1099, by which the performance rating system has been altered, and provision is now made for only three such ratings, "Outstanding", "Satisfactory," and "Unsatisfactory." An "Unsatisfactory" rating, after warning, requires the dismissal of the employee. For practical purposes, therefore, any preference employee who can remain on the federal pay-roll has a right under this provision to displace any competing employee, even one with an "Outstanding" rating.

There can be no substantial question that this section discriminates against non-veteran employees, and that it deprives the executive authority of any discretion or judgment as to the retention or dismissal of employees upon consideration of the best interests of the government or the efficiency of the civil service. The encroachment upon the authority of the executive in this respect is subject to considerable constitutional question. Cf. Myers v. United States, 272 US 52, 125, 126.

The Act in terms provides for and requires discrimination against the government employee who does not have veterans' preference. The effectiveness of the Act in accomplishing the ultimate exclusion from the federal service of all except veterans can hardly be denied in the light of the developments of the last ten years in the federal personnel. In 1946, forty seven per cent of the male employes of the federal government had veterans preference. In 1952, this percentage had risen to fifty seven per cent, although veterans represented only about twenty eight per cent of the nation's total employment force; and in 1955, this figure for government employees had increased to sixty-two per cent, although the percentage of veterans in the total employment force remained constant at about twenty eight per cent.[1] Although the increasing disproportion of veterans in the government service is partially accounted for by the preference they receive upon initial employment by the government, the causative relation of the absolute retention preference given by the second proviso of Section 12 is an even more important factor in the accomplishment of the eventual result of excluding non-veterans from government service entirely.

The inequitable effect of this provision on the citizens such as these plaintiffs who, through no fault of their own, lack veterans preference has been demonstrated. The most comprehensive of these

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[1] The basic figures for the percentages of government employes for 1946 and 1952 are set forth in "Reduction in Force System in the Federal Government," Senate Report No. 2102, 82d Congress, 2d Session, p. 22. Remaining calculations are from tables 236, 293, and 461, Statistical Abstract of the United States, 1956.

studies was that conducted by the Senate Committee on Post Office and Civil Service[1] which concluded:

> (b) That within tenure groups, employes with veterans preference have absolute retention rights over nonveterans regardless of length of service.
>
> (c) That subordinating length of service to tenure and veterans' preference creates severe inequities, and often results in the Government losing its experienced and highly skilled career employees.

Thus, it is clear, the challenged section does discriminate between those government employees who do not have veterans' preference and those who do. Since the Fifth Amendment contains no requirement of "equal protection of the laws", the fact of differentials in treatment does not, of itself, invalidate an Act of Congress. However, arbitrary discrimination is forbidden by the due process clause. United Public Workers v. Mitchell, 330 US 75; Wieman v. Updegraff, 344 US 183; Slochower v. Board of Education, 350 US 551. These decisions establish as modern law the statement of Justice Bradley, dissenting in Ex parte Curtis, 106 US 371, 376:

> I do not believe that Congress has any right to impose such a condition on any citizen of the United States. The offices of the Government do not belong to the legislative department, to dispose of on any conditions it may choose to impose. The Legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties, but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are or ought to be open to all. They belong to the United States and not to Congress, and every citizen, having the proper qualifications, has the right to accept office and be a candidate therefor. This is a fundamental right of which the Legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights.

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[1] Senate Report No. 2102, 82d Congress, 2d Session, p. 20. The committee lists specific cases of inequities at pp. 16 et seq. of the Report. A dramatic illustration of the effect of the section upon employment tenure is reported in the Portsmouth (Va.) Star, February 25, 1957, p. 11, col. 4. In this case, two apprentices who had become journeymen molders only 18 days previously replaced employees with 29 and 28 years of service.

On this principle, it follows that Congress may establish offices and establish conditions upon which they may be retained. To that end, it may establish reasonable classifications, but it may not arbitrarily discriminate against one class of citizens in favor of another.

The power of Congress to legislate is an extremely broad one, but by the express terms of the grant of legislative power in the Constitution, the acts of Congress must be taken in order to carry out some power which is granted to it. For that reason, its acts must be reasonably related to the legitimate aim of the legislation. There must be a rational connection between the statute and its objects. American Communication Association v. Douds, 339 US 382, 404.

Inasmuch as an arbitrary act or classification may be defined as one which is without valid reasons,[1] an examination must be made of the reasons which might justify the establishment of the absolute retention right of the employe with veterans preference.

This issue should be put in perspective by pointing out that the attack is not a general one upon the privileges extended to veterans. The statute provides for point advantages upon initial entry into the government service. Section 12 itself provides, in the first proviso, for a consideration of veteran status, along with other relevant considerations in the determination of which employee should be retained. It also requires the calculation as a part of longevity of all time spent in the military forces. To this extent, the statute establishes the traditional preference of veterans against which the plaintiffs make no attack here. The character and extent of the preference has been described by the Supreme Court in Keim v. United States, 177 US 290, 295, where the Court said:

> No thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy. Congress has generously provided for the discharge of those obligations in a system of pensions more munificent

[1] In Carmack v. United States, 329 US 230, 247, the Supreme Court defined "arbitrary" as meaning a "selection . . . without adequate determining principle and without reason." In Shachtman v. Dulles, 96 US App DC 287, 225 F2d 938, this Court defined arbitrary action as that taken without a sufficient reason.

> than has ever before been known in the history of the world. But it would be an insult to the intelligence of Congress to suppose that it contemplated any degradation of the civil service by the appointment to or continuance in office of incompetent or inefficient clerks simply because they had been honorably discharged from the military or naval service. The preference, and it is only a preference, is to be exercised as between those "equally qualified" . . .

The complaint in this case is of the section of the statute which requires that the veteran be retained, even though it means the discharge of a non-veteran government employe of greater seniority, skill, or merit. Such an absolute privilege, without regard to qualifications for the public service, is clearly arbitrary. Statutes which disregard the principle of protecting the public service by requiring consideration of the merits of the competing employees have been held unconstitutional Brown v. Russell, 166 Mass. 14, 43 NE 1005; Cook v. Mason, 103 Cal. App. 6, 283 P 89; State ex rel Kangas v. McDonald, 188 Minn 187, 246 NW 900; Commonwealth ex rel Graham v. Schmid, 333 Pa. 568, 3 A2d 701; Carney v. Lowe, 336 Pa 289, 9 A2d 418. The basic distinction between the preferences created in the first proviso, which the plaintiffs do not attack here, and the second proviso, which is challenged as arbitrary, was stated by Mr. Justice Cardozo in Barthelmess v. Cukor, 231 NY 435, 132 NE 16 A. L. R. 1404, 1406:

> . . . [The Legislature] may say that military or naval service . . . is something to be counted by the examiners, like experience in other fields, . . . Service so considered does not override the results of competitive examination, but enters into the results as a contributory factor. A different situation arises when service controls selection, irrespective of qualifying value. It is the difference between an appraisal of merit, an estimate of fitness, and a preference or bonus.

A similar result was reached in Commonwealth ex rel Graham v. Schmid, 333 Pa 568, 3 A2d 701, 120 ALR 777, 779, where the Court said:

> . . . But, on the other hand, where war service is appraised beyond its value, and the preference goes beyond the scope of the actual advantages gained in such service, the classification becomes void and the privilege is held unreasonable and arbitrary. Public policy demands such a rule of law. It is essential to the administration of public affairs that governmental employes be selected on the basis of their ability to perform the duties imposed upon them in an efficient manner, and if public servants are not selected on this basis, the appointing power violates its oath of office; where the legislature so provides, it offends the constitutional mandate.

That the absolute retention right granted by the second proviso of Section 12 has worked to the grave disadvantage of the government and the efficiency of the public service, none can deny. The President's Commission on Veterans' Pensions has, after a thorough study of the problem of the obligations of the government to veterans of the military services, concluded:[1]

> Preference in retention during reductions in force for non-disabled veterans has no real relation to readjustment needs and does violence to the basic principles of the Federal merit system. The goals of open competition and equal treatment for all, on the basis of their ability to serve the public as employes, cannot be achieved if there is arbitrary discrimination in favor of one group based on factors having nothing to do either with their efficiency or with their readjustment needs as veterans.

The damage to the government resulting from this arbitrary and inequitable discrimination in favor of veterans, irrespective of considerations of ability and merit, was likewise pointed out by the Senate Committee on the Post Office and Civil Service, which said:[2]

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[1] President's Commission on Veterans' Pensions, Veterans Benefits in the United States (1956), p. 318.

[2] "Reduction-in-Force System in the Federal Government," Report of the Senate Post Office and Civil Service Committee, 82d Congress, 2d Session, Report No. 2102 (1952), pp. 23, 24.

> Within these categories veterans have absolute preference of retention over nonveterans regardless of the longer service of the latter . . . The inequity is clear: a veteran within each of these tenure groups with only 6 months service and a "satisfactory" performance rating has priority for retention over a nonveteran employee, even though he might have 20 years' service and an "outstanding" rating. The result is that Government is gradually losing many of its most experienced and highly skilled employees. Moreover, arsenals, ordnance laboratories and plants, and navy yards report that they cannot recruit skilled men for these positions, and former employees who have been laid off in reductions, will not return to Government employment as a consequence of this basic inequality in competing for retention.

The damage to the efficiency of the federal service is sufficient to demonstrate that the absolute retention right created by the challenged section is unreasonable and therefore arbitrary. It becomes all the more arbitrary and unreasonable in the light of modern day needs and methods in the conduct of hostilities and in the raising of armies. In a day when the recruitment of troops was voluntary, and wars were actually fought by soldiers on the field of battle, there was obviously a need and a reason for the holding out of special inducements to secure enlistment in the armed forces, and in those times, the fact that a man had volunteered for service could indeed be considered as having made a special sacrifice for the nation which entitled him to special privileges at its hands. Modern conditions of warfare have done much to alter the basic argument upon which the claim of special privilege for veterans is premised.

Without discrediting one iota the magnificent service of America's fighting men during the war, it is necessary to point out that civilians, such as these plaintiffs, who manned the ordnance factories and naval yards during the war also contributed greatly to the final fictory. But what is important in weighing the arbitrary character of invidious distinctions against such civilians is the fact that neither the soldier nor

the civilian had any choice as to the manner in which he would have served his nation. Two of these plaintiffs actually attempted to serve in the armed forces and were prevented from doing so because, in the opinion of the Government, their services were more valuable to the war effort in the civilian industrial jobs which they held.

White was inducted in the navy, but was immediately furloughed and reassigned to his civilian work in the navy yard at Pearl Harbor (JA 2), and Phillips attempted to volunteer and was not permitted to do so (JA 18). It is apparent that but for the action of the government, taken to serve its own needs during the war, both of these plaintiffs would now possess the veterans preference for the lack of which Section 12 requires that they lose their jobs irrespective of the merits of the competing employees. In point of fact, all of these plaintiffs were employed during the war years in establishments which were designated as "essential" (29 CFR, Cumulative Supplement, 1943, Sec. 904.1 et seq.). They were permitted neither to leave this work nor to volunteer for the armed services (32 CFR, Cumulative Supplement, 1943, Sec. 624.4. See also, Executive Orders Nos. 9139 and 9279).

For the government to prevent workers in essential industries and establishments from leaving their jobs, and later to penalize them because they did not, as they could not, become members of the armed forces is so unjust as to require no demonstration of its arbitrary character.

Nor does the discrimination operate only against civilian employees. Even those who may have volunteered and served in the armed forces, but at a time when the nation was not engaged in war, suffer the effect of the arbitrary retention right created by Section 12. The Act, 5 US Code Sec. 851, expressly limits veterans preference to those who have served in war-time or in campaigns for which a campaign ribbon has been authorized. Nothing could be more conclusive of the arbitrary character of the classification attempted by the Act, because no voluntary act of the

person excluded by the accident of time and place can affect his rights to be considered fairly for retention in government employment.

This, indeed, is a classification without reason and without guiding principle.

The lower court attempted to equate this absolute preference to the special privileges awarded the veteran in the form of pensions, bonuses, and similar governmental largess. Governmental employment is not a pension. Whether all of the grants which have been made to veterans serve a public purpose need not be debated here. The constitutional validity of such public donations has been questioned. Cf. Marshall Field & Co. v. Clark, 143 US 649, 695.

But it is logically wrong to equate the grant of a pension to the privilege of absolute retention, irrespective of qualification in the government service. Pensions and other grants are provided from public funds supplied by the taxpayers generally. Although the expenses of such grants are by no means small, the burden to any individual citizen undoubtedly represents de minimis, and Congress is perhaps fully justified in ignoring the expense to any individual citizen imposed by its generous and historically approved grants to veterans.

But this is not so of the absolute retention in government employment provided by Section 12 of the Veterans' Preference Act, for here, the injury falls directly upon one individual who loses his employment for the sole reason that the law requires it in order to retain a less qualified competitor. Not infrequently, the loss is a crushing one to the individual, who may be deprived of any livelihood simply because long and honorable service in the government has brought him to the age at which it is impossible to start over in private employment. Phillips, for instance, was compelled to take a substantial reduction in pay because of his age. He could not find equivalent employment outside of the government (JA 19). Pitts and Murray were likewise deprived of opportunity to secure other employment because of the age factor. The

distinction between granting a bounty at the expense of all the taxpayers and granting one at the expense of the individual plaintiffs' and their right to have a fair consideration of qualifications in determining who should be retained is so obvious as to require no elaboration.

In the court below, the defendants argued that the long history of special benefits extended to veterans in the past eighty years is itself a basis for holding the challenged proviso of the Act of 1944 to accord with due process of law. This argument completely loses its force when the facts are examined. It is true that as a basis for making a selection between equals, veteran status has long been recognized as a factor in the determination. But that is not the concept nor the preference which is under attack here. The grant to veterans of an absolute right of retention, irrespective of qualification, is attacked, and that arbitrary concept did not enter into the statutory scheme until the passage of this very section. Consequently, it cannot be said that the absolute right of retention, without consideration of qualification, has any history of public acceptance.

CONCLUSION

For the reasons set out, it is abundantly clear that the discrimination against these plaintiffs contained in the second proviso of Section 12 of the Veterans' Preference Act of 1944 has no basis in reason, and is an arbitrary and invidious distinction between the plaintiffs and the beneficiaries of Section 12. Such discrimination is repugnant to the due process clause, and the Act is therefore unconstitutional. The plaintiffs are entitled to relief against its operation.

Respectfully submitted,

CARL W. BERUEFFY

636 Wyatt Building
Washington 5, D. C.

Attorney for Appellants.

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1

[Filed Feb. 1, 1956]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

WESLEY D. WHITE,
216 Baylor Court
North Charleston,
South Carolina,
Plaintiff

v.

CHARLES S. THOMAS,
The Pentagon
Washington, D.C.,
Defendant.

Civil Action No. 450-56

COMPLAINT FOR INJUNCTION

1. This action arises under the Fifth Amendment to the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. Plaintiff is a citizen of the United States and of the State of South Carolina.

3. Defendant is the duly appointed, qualified, and acting Secretary of the Navy of the United States. In such capacity, defendant is authorized to control and manage the various naval establishments of the United States, and more specifically, the Charleston Naval Shipyard, at Charleston, South Carolina.

4. Plaintiff is now, and since November 1, 1939, has been a civilian employee of the Department of the Navy. Plaintiff is now employed as a pipefitter, third step, at the Charleston Naval Shipyard, and holds such position by virtue of a career appointment. His earnings from said employment exceed $4,500.00 per year.

2 5. On or about October 24, 1944, plaintiff was employed as a pipefitter by the Department of the Navy at Pearl Harbor, Territory of Hawaii. On said date, plaintiff was drafted into the United States Navy and was accepted for service therein. By reason of the essential

character of his civilian work, immediately upon his enrollment in the United States Navy, plaintiff was placed on indefinite furlough from the Navy, such furlough to be effective so long as plaintiff remained at his employment at Pearl Harbor and performed his work satisfactorily. Plaintiff continued to perform such work in accordance with such furlough until August 29, 1945, when he was discharged by the Navy and returned to said work as a civilian.

6. Defendant has established procedures for the discharge, reduction in grade and pay, or laying-off of persons employed by the establishments of the Department of the Navy, including the Charleston Naval Shipyard, and has directed the preparation of "retention registers" to govern such personnel actions in the event of a reduction in force. Such registers are based upon "areas of competition", "retention groups", and "retention credits". Defendant has further directed that such retention registers be prepared in such manner as to distinguish those employees having veteran status from those who do not have such status. Veterans employees are designated as Group IA and employees without veteran status are designated as Group IB employees, Group I employees being composed of those employees serving under unlimited career appointments. Plaintiff has been designated as Group IB.

7. Purporting to act in pursuance of the provisions of Section 12 of the Act of June 27, 1944, as amended, 5 U.S. Code Sec. 861, defendant has directed that all employees classified as Group IB shall be discharged before any employee classified as Group IA is discharged or furloughed.

3 8. Section 12 of the Act of June 27, 1944, as amended, is arbitrary, unreasonable, and void, in that, in contravention of the requirements of the Fifth Amendment of the United States, it deprives plaintiff of his right to compete for retention in his present employment without due process of law, in that it arbitrarily deprives plaintiff of his right to seek and retain such employment.

9. Defendant is presently threatening to reduce the employment at the Charleston Naval Shipyard, and to accomplish such reduction

in force on the basis of the retention registers hereinabove described, and will do so unless restrained by the order of this Court. Such threatened acts will deprive plaintiff of his liberty and property without due process of law, and will deprive him of his employment, to the irreparable damage of the plaintiff.

10. Plaintiff has no adequate remedy at law.

WHEREFORE, Defendant demands judgment enjoining and restraining the defendant, his agents, servants, employees, and all persons in active concert and participation with him, from preparing or maintaining any retention register in which any distinction in retention rights are made upon the basis that all persons with veterans' status shall be retained until all persons without such status have been furloughed or discharged; from discharging, furloughing, or laying-off the plaintiff solely for the purpose of retaining in the employment of the Charleston Naval Shipyard any other person solely upon the ground that such other person has veteran status; and for such other relief as may be just and equitable.

/s/ Carl W. Berueffy

Attorney for Plaintiff
636 Wyatt Building
Washington 5, D.C.

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4 [Filed Mar 27, 1956]

ANSWER

Defendant answers to complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the complaint.

2. Defendant admits the allegations contained in paragraph 2 of the complaint.

3. Defendant admits the allegations contained in paragraph 3 of the complaint.

4. Defendant admits the allegations contained in paragraph 4 of the complaint.

5. Defendant admits the allegations contained in paragraph 5 of the complaint except that he alleges plaintiff was inducted into the Navy on October 12, 1944.

6. Defendant admits the allegations contained in paragraph 6 of the complaint but alleges further that the regulations spoken of are in accordance with Civil Service Regulations.

7. Defendant admits the allegations contained in paragraph 7 of the complaint but alleges further that he has in fact acted under statutory authority and pursuant to Civil Service Regulations in setting up discharge procedure.

8. Defendant denies the allegations contained in paragraph 8 of the complaint.

9. Defendant denies the allegations contained in paragraph 9 of the complaint except that he admits a reduction in force is now being contemplated at the Charleston Naval Shipyard and that the reduction, when and if made, will be consistent with the provisions of the Veteran's Preference Act and Civil Service Regulations.

10. Defendant denies the allegations contained in paragraph 10 of the complaint.

Additional Defenses

1. The complaint fails to set forth a justiciable case or controversy.

2. Plaintiff has no standing to sue.

3. The complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, defendant demands judgment together with costs of this action.

/s/ Leo A. Rover,
United States Attorney

/s/ Edward H. Hickey
Attorney, Department of Justice

/s/ Donald B. MacGuineas
Attorney, Department of Justice

/s/ Charles J. Steele
Attorney, Department of Justice

Attorneys for the Defendant

(CERTIFICATE OF SERVICE)

[Filed May 4, 1956]

DOCTOR R. WINTER
29 Allen Drive
Dorchester Terrace
Naval Base
South Carolina

FREDERICK P. BLUROCK
620 O'hear Avenue
North Charleston, South Carolina

HERBERT B. HAMMOND
3100 Iona Avenue
Charleston Heights, South Carolina

JAMES WILLIAMS
2014 Hugo Avenue
Charleston, South Carolina

CHRISTOPHER WRIGHT
1450 Montague Avenue
Liberty Hill
Charleston, South Carolina

Plaintiffs

vs.

CHARLES S. THOMAS
Secretary of the Navy
The Pentagon
Washington, D.C.

Civil Action No. 1859-56

COMPLAINT FOR AN INJUNCTION

1. This action arises under the Fifth Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy, as to each individual plaintiff herein in his own right, exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. Plaintiff, Doctor R. Winter, is a citizen of the United States

and of the State of South Carolina, and resides at 29 Allen Drive, Dorchester Terrace, Naval Base, South Carolina. From June 10, 1918, to December 9, 1921, and since March 2, 1935 to the date of filing this com-
8 plaint, plaintiff Winter, has been employed at the Charleston Naval Shipyard in Charleston, South Carolina, and is now employed as a leading-man shipfitter at an annual salary of $5,969.60. As of March 26, 1956, there were 16 leading-men shipfitters employed in the Charleston Naval Yard with less experience and length of employment in the Charleston Naval Yard than plaintiff Winter, who are being retained in employment in preference to plaintiff solely because they have veteran status. During all of his employment, plaintiff has received performance ratings of "Satisfactory" or better, and on five performance ratings he received "Excellent", and on one performance rating he received "Very Good". On April 3, 1956, plaintiff, Winter, received a notice from the agents of defendant that his employment would be terminated on May 11, 1956, by reason of a reduction in force at the Charleston Naval Yard.

3. Plaintiff, Frederick P. Blurock, is a citizen of the United States and of the State of South Carolina, and resides at 620 O'hear Avenue, North Charleston, South Carolina. From December 5, 1939, to the date of filing this complaint, plaintiff, Frederick P. Blurock, has been employed at the Charleston Naval Shipyard in Charleston, South Carolina, and is now employed as a shop analyst and scheduler (machinist) at an hourly wage of $2.76 per hour, being an annual compensation of $5,740.80. As of March 26, 1956, there were 14 shop analysts and schedulers (machinist) employed in the Charleston Naval Yard with less experience and length of employment in the Charleston Naval Yard than plaintiff Blurock, who are being retained in employment in preference to plaintiff solely because they have veteran status. During all of his employment, plaintiff has received performance ratings of "Satisfactory" or better, and on eight performance ratings he received "Excellent", and on two performance ratings he received "Very Good". On April 10, 1956, plaintiff, Blurock, received a notice from the

agents of defendant that his employment would be terminated on June 1, 1956, by reason of a reduction in force at the Charleston Naval Yard.

4. Plaintiff, Herbert B. Hammond, is a citizen of the United States and of the State of South Carolina, and resides at 3100 Iona Avenue, Charleston Heights, South Carolina. From May 7, 1934, to the date of filing this complaint, plaintiff Hammond, has been employed at the Charleston Naval Shipyard in Charleston, South Carolina, and is now employed as a leading-man welder (electric) at an annual salary of $5,740.82. As of March 26, 1956, there were 4 leading - men welders (electric) employed in the Charleston Naval Yard with less experience and length of employment in the Charleston Naval Yard than plaintiff Hammond, who are being retained in employment in preference to plaintiff solely because they have veteran status. During all of his employment, plaintiff has received performance ratings of "Satisfactory" or better, and on twelve performance ratings he received "Very Good". On April 3, 1956, plaintiff, Hammond, received a notice from the agents of defendant that his employment would be terminated on July 2, 1956, by reason of a reduction in force at the Charleston Naval Yard.

5. Plaintiff, James Williams, is a citizen of the United States and of the State of South Carolina, and resides at 2014 Hugo Avenue, Charleston, South Carolina. From January 31, 1934 to July 9, 1934, and since June 10, 1935 to the date of filing this complaint, plaintiff Williams, has been employed at the Charleston Naval Shipyard in Charleston, South Carolina, and is now employed as a helper machinist at an hourly wage of $1.53 per hour, being an annual compensation of $3,182.40. As of March 26, 1956, there were 36 machinist helpers employed in the Charleston Naval Yard with less experience and length of employment in the Charleston Naval Yard than Plaintiff, Williams, who are being retained in employment in preference to plaintiff solely because they have veteran status. During all of his employment, plaintiff has received performance ratings of "Satisfactory" or better,

and on three performance ratings he received "Very Good". On April 10, 1956, plaintiff Williams, received a notice from the agents of defendant that his employment would be terminated on July 2, 1956, by reason of a reduction in force at the Charleston Naval Yard.

6. Plaintiff, Christopher Wright, is a citizen of the United States and of the State of South Carolina, and resides at 1450 Montague Avenue, Liberty Hall, Charleston, South Carolina. From June 5, 1931, to the date of filing this complaint, plaintiff Wright, has been employed at the Charleston Naval Shipyard in Charleston, South Carolina, and is now employed as a helper machinist at an hourly wage of $1.53 per hour, being an annual compensation of $3,182.40. As of March 26, 1956, there were 37 helper machinists employed in the Charleston Naval Yard with less experience and length of employment in the Charleston Naval Yard than plaintiff Wright who are being retained in employment in preference to plaintiff solely because they have veteran status. During all of his employment, plaintiff has received performance ratings of "Satisfactory" or better, and on nine performance ratings he received "Very Good". On April 10, 1956, plaintiff Wright, received a notice from the agents of defendant that his employment would be terminated on July 2, 1956, by reason of a reduction in force at the Charleston Naval Yard.

7. Each of the plaintiffs is a member of a class consisting of those persons employed at the Charleston Naval Shipyard who have permanent Civil Service Status and who are being discharged or demoted solely because they do not have veteran's status and who are
11 being discharged solely in order to retain employees of less seniority and experience who possess such veteran status. Said class is composed of individuals too numerous to be named individually as plaintiffs, and plaintiffs institute this suit for themselves and for all others similarly situated.

8. The defendant is the duly appointed, qualified, and acting Secretary of the Navy of the United States, and in such capacity has authority to control the operations of the various establishments of

the department of the Navy, including the Charleston Naval Shipyard. All of the persons hereinafter mentioned are subordinates of defendant and are subject to his direction and control.

9. Defendant has established procedures for the discharge, reduction in grade and pay, or laying-off of persons employed by the establishments of the Department of the Navy, including the Charleston Naval Shipyard, and has directed the preparation of "retention registers" to govern such personnel actions in the event of a reduction in force. Such registers are based upon "areas of competition", "retention groups", and "retention credits". Defendant has further directed that such retention registers be prepared in such manner as to distinguish those employees having veteran status from those who do not have such status. Veteran employees are designated as Group IA and employees without veteran status are designated as Group IB employees, Group I employees being composed of those employees serving under unlimited career appointments. Plaintiffs have been designated as Group IB.

10. Purporting to act in pursuance of the provisions of Section 12 of the Act of June 27, 1944, as amended, 5 U.S. Code Sec. 861, defendant has directed that all employees classified as Group IB shall be discharged before any employee classified as Group IA is discharged or furloughed.

12 11. Section 12 of the Act of June 27, 1944, as amended, is arbitrary, unreasonable, and void, in that, in contravention of the requirements of the Fifth Amendment of the United States, it deprives each of the plaintiffs and each member of the class herein described, of his right to compete for retention in his present employment without due process of law, in that it arbitrarily deprives each of the plaintiffs and each member of the class herein described of his right to seek and retain such employment.

12. As a result of the arbitrary and illegal action of the defendant herein complained of, each of the plaintiffs and every person similarly situated will suffer grave and irreparable damage for which

he has no adequate remedy at law. Each of said persons will be discharged from his present employment and will be obliged to seek employment elsewhere and will lose wages and steady employment. Granting of the remedy herein prayed will prevent a multiplicity of suits.

WHEREFORE plaintiffs and each of them demand judgment restraining the defendant from discharging any person from his employment in accordance with any rules purportedly based upon Sec. 12 of the Act of June 27, 1944, as amended, and requiring the defendant to restore plaintiffs and each of them to their employment as aforesaid, and for such other and further relief as may be just and equitable.

/s/ Carl W. Berueffy
Attorney for Plaintiffs

* * *

13]Filed June 29, 1956]

ANSWER

Defendant answers to complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the complaint.

2. Defendant admits the allegations contained in paragraph 2 of the complaint except that he alleges that plaintiff Winter was initially employed at the Charleston Naval Shipyard on June 29, 1917. Defendant alleges further that as a result of a reduction in force on May 21, 1956 plaintiff Winter was not discharged but was demoted to shipfitter at a compensation of $2.30 per hour and now holds that position and that defendant now contemplates no further change with regard to plaintiff Winter's petition.

3. Defendant admits the allegations contained in paragraph 3 of the complaint but alleges further that on May 16, 1956 plaintiff Blurock's notice of separation due to reduction in force was cancelled

and that plaintiff is now employed at Charleston Naval Shipyard in the same position as when his complaint was filed and that no change in that position is now contemplated.

14 4. Defendant admits the allegations contained in paragraph 4 of the complaint except that he alleges that plaintiff Hammond was initially employed at the Charleston Naval Shipyard on April 28, 1936. Defendant alleges further that on April 17, 1956 plaintiff Hammond's reduction in force notice was cancelled and that plaintiff is now employed at Charleston Naval Shipyard in the same position as when his complaint was filed and that no change in that position is now contemplated.

5. Defendant admits the allegations contained in paragraph 5 of the complaint except that he alleges that plaintiff Williams was reinstated on May 1, 1935. Defendant alleges further that plaintiff Williams' reduction in force notice was cancelled on May 16, 1956 and that plaintiff is now employed at Charleston Naval Shipyard in the same position as when his complaint was filed and that no change in that position is now contemplated.

6. Defendant admits the allegations contained in paragraph 6 of the complaint except that he alleges that plaintiff Wright was initially employed at the Charleston Naval Shipyard on April 20, 1933. Defendant alleges further that plaintiff Wright's notice of reduction in force was cancelled on May 16, 1956 and that plaintiff is now employed at Charleston Naval Shipyard in the same position as when his complaint was filed and that no change in that position is now comtemplated.

7. Defendant denies the allegations contained in paragraph 7 of the complaint.

8. Defendant admits the allegations contained in paragraph 8 of the complaint.

9. Defendant admits the allegations contained in paragraph 9 of the complaint but alleges further that his actions alleged in said paragraph are in conformity with the Veterans' Preference Act and Civil Service regulations.

15 10. Defendant admits the allegations contained in paragraph 10

of the complaint but alleges further that he has in fact acted under statutory authority and pursuant to Civil Service regulations in setting up the alleged discharge procedures.

11. Defendant denies the allegations contained in paragraph 11 of the complaint.

12. Defendant denies the allegations contained in paragraph 12 of the complaint.

/s/ Oliver Gasch
United States Attorney

/s/ Edward H. Hickey
Attorney, Department of Justice

/s/ Donald B. MacGuineas
Attorney, Department of Justice

/s/ Charles J. Steele
Attorney, Department of Justice

Attorneys for Defendant

(CERTIFICATE OF SERVICE)

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16 [Filed May 4, 1956]

EDGAR W. PITTS,
53 Duryea Street,
Springfield, Massachusetts)

JOSEPH A. MURRAY
46 Albemarle Street,
Springfield, Massachusetts,)

Plaintiffs)

v.) Civil Action No. 1870-56

WILBUR M. BRUCKER,
Secretary of the Army,
The Pentagon,
Washington, D.C.)

Defendant)

COMPLAINT FOR AN INJUNCTION

1. This action arises under the Fifth Amendment to the Constitution of the United States, as hereinafter more fully appears.

The matter in controversy, as to each individual plaintiff herein in his own right, exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. Plaintiff, Edgar W. Pitts, is a citizen of the United States and of the Commonwealth of Massachusetts, and resides at 53 Duryea Street, Springfield, Massachusetts. From November 23, 1926, until April 27, 1956, plaintiff was employed at the Springfield Armory, Springfield, Massachusetts, and until discharged as herein set forth, was employed as a Machining Inspector, Wage Board 6, Step 4, at an hourly wage of $1.89, or an annual compensation of $3931.20. On March 23, 1956, there were 47 machining inspectors with less experience and length of employment at the Springfield Armory, who are being retained in employment in the Springfield Armory in preference to plaintiff solely because they have veteran status. On April 27, 1956, plaintiff's employ-
17 ment was terminated by defendant's agents by reason of a reduction in force at the Springfield Armory.

3. Plaintiff, Joseph A. Murray, is a citizen of the United States and of the Commonwealth of Massachusetts, and resides at 46 Albemarle Street, Springfield, Massachusetts. Plaintiff has been employed at the Springfield Armory, and has eighteen years and ten months seniority in said establishment. At the time of the termination of his employment, as hereinafter set forth, plaintiff was employed as a Filer, Wage Board 6, Step 4, at an hourly wage of $1.89, or an annual compensation of $3921.20. Thirty persons of less experience and seniority have been re-assigned from other Departments of the Springfield Armory and have been given employment similar to plaintiff's and are being retained therein solely because they have veteran status. On April 27, 1956, plaintiff's employment was terminated by defendant's agents by reason of a reduction in force at the Springfield Armory.

4. Each of the plaintiffs is a member of a class consisting of those persons employed at the Springfield Armory who have permanent civil service status and who have been or will be discharged or demoted solely because they do not have veteran status and who are being

discharged solely in order to retain employees of less seniority and experience who possess such veteran status. Said class is composed of individuals too numerous to be named individually as plaintiffs, and plaintiffs institute this suit in their own behalf and for all others similarly situated.

5. The defendant is the duly appointed, qualified and acting Secretary of the Army of the United States, and in such capacity has authority to control and direct the operations of the various establishments of the Department of the Army, including the Springfield Armory. All of the persons hereinafter mentioned are subordinates of defendant
18 and are subject to his direction and control.

6. Defendant has established procedures for the discharge, reduction in grade and pay, or laying-off of persons employed by the establishments of the Army, including the Springfield Armory, and has directed the preparation of "retention registers" to govern such personnel actions in the event of a reduction in force. Such registers are based upon "areas of competition", "retention groups", and "retention credits". Defendant has further directed that such retention registers be prepared in such manner as to distinguish those employees having veteran status from those who do not have such status. Veteran employees are designated as Group IA and employees without veteran status are designated as Group IB employees, Group I employees being composed of those employees serving under unlimited career appointments. Plaintiffs have been designated as Group IB.

7. Purporting to act in pursuance of the provisions of Section 12 of the Act of June 27, 1944, as amended, 5 U.S. Code, Section 861, defendant has directed that all employees classified as group IB shall be discharged before any employees classified as Group IA are discharged or furloughed.

8. Section 12 of the Act of June 27, 1944, as amended, is arbitrary, unreasonable, and void, in that, in contravention of the requirement of the Fifth Amendment to the Constitution of the United States, it deprives each of the plaintifs, and each member of the class herein

described, of his right to compete for retention in his employment without due process of law, in that it arbitrarily deprives each of the plaintiffs of his right to seek and retain such government employment.

9. As a result of the arbitrary and illegal action of the defendant herein complained of, each of the plaintiffs and every person similarly situated will suffer grave and irreparable damage for which he has no
19 adequate remedy at law. Each of said persons will be discharged from his present employment and will be deprived of his opportunity to earn wages, and will suffer damages incapable of precise calculation. Granting of the remedy herein prayed will prevent a multiplicity of suits.

WHEREFORE, plaintiffs, and each of them, demand judgment restraining the defendant, his agents, servants, and employees, and all persons in active concert and participation with them, or any of them, from discharging any person employed in the Springfield Armory from such employment in accordance with any rules purportedly based upon Section 12 of the Act of June 27, 1944, as amended, and requiring defendant to restore plaintiffs and each of them to their employment as aforesaid, and for such other relief as may be just and equitable.

/s/ Carl W. Berueffy
Attorney for Plaintiffs

* * *

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20 [Filed Aug. 1, 1956]

ANSWER

Defendant answers to complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the complaint.

2. Defendant admits the allegations contained in paragraph 2 of the complaint except that he alleges that plaintiff Pitts' employment was terminated on June 29, 1956.

3. Defendant admits the allegations contained in the first three sentences of paragraph 3 of the complaint. Defendant denies that there were 30 persons retained instead of plaintiff Murray solely because of their veteran's status and alleges further that there were 12 persons with greater retention rights than plaintiff Murray at the time of the termination of his employment. These 12 had higher retention status than plaintiff Murray because they were veterans and 4 of the 12 also because of longer periods of employment than plaintiff Murray. Defendant admits that plaintiff Murray's employment was terminated on April 27, 1956.

4. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 4 of the complaint and so denies them. Defendant admits, however, that plaintiffs' employment has been terminated in accordance with the Veterans' Preference Act and Civil Service Regulations, as are all reductions in force of civilian employees which take place within the Department of the Army.

21 5. Defendant admits the allegations contained in paragraph 5 of the complaint.

6. Defendant admits the allegations contained in paragraph 6 of the complaint but alleges further that all procedures for the discharge, reduction in grade and pay and laying off of persons employed by the establishments of the Department of the Army are in conformity with the Veterans' Preference Act and Civil Service Regulations.

7. Defendant admits the allegations contained in paragraph 7 of the complaint but alleges further that he has in fact acted under statutory authority and pursuant to Civil Service Regulations in setting up discharge procedures.

8. Defendant denies the allegations contained in paragraph 8 of the complaint.

9. Defendant denies the allegations contained in paragraph 9 of the complaint but admits that, if the needs of the Department of the

Army require, reduction in force in conformity with the Veterans' Preference Act and Civil Service Regulations, will be made.

/s/ George Cochran Doub
Assistant Attorney General
/s/ Oliver Gasch
United States Attorney
/s/ Edward H. Hickey
Attorney, Department of Justice
/s/ Donald B. MacGuineas
Attorney, Department of Justice
/s/ Charles J. Steele
Attorney, Department of Justice
Attorneys for the Defendant

22 (CERTIFICATE OF SERVICE)

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23 [Filed May 4, 1956]

GEORGE R. PHILLIPS,
468 Myrtle Avenue
Brooklyn, New York,
Plaintiff,

vs.

CHARLES S. THOMAS,
Secretary of the Navy,
The Pentagon,
Washington, D.C.,
Defendant

Civil Action No. 1871-56

COMPLAINT FOR AN INJUNCTION

1. This action arises under the Fifth Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. Plaintiff is a citizen of the United States and of the State of

New York, and resides at 468 Myrtle Avenue, Brooklyn, New York. Since August 8, 1936, plaintiff has been employed at the New York Naval Shipyard, Brooklyn, New York, and is now so employed.

3. The defendant is the duly appointed, qualified, and acting Secretary of the Navy of the United States, and in such capacity has authority to control the operations of the various establishments of the department of the Navy, including the New York Naval Shipyard. All of the persons hereinafter mentioned are subordinates of defendant and are subject to his direction and control.

4. Prior to March 30, 1956, plaintiff was employed as a planner-estimator at the New York Naval Shipyard at a wage of $3.02 per hour, and an annual gross compensation of $6,281.60. Plaintiff is an employee
24 having permanent civil service status and has a right to continue in said employment unless and until discharged in accordance with the valid laws enacted by Congress governing such employment and such status.

5. On or about February 27, 1956, plaintiff received a notice from the Commander of the New York Naval Shipyard, a copy of which is hereto attached and the contents of which are incorporated herein by reference.

6. During the years 1942 to 1945, plaintiff was subject to the provisions of the Selective Service Act, and could and would have become a member of the armed forces of the United States, and could and would have become entitled to veteran's status under the laws governing the employment of civilians by the United States government. Defendant's predecessors prevented plaintiff's acquisition of such status by requesting and obtaining a draft deferment. In pursuance of rules and regulations promulgated under the authority of the Second War Powers Act (50 U.S.Code, Appendix, Sec. 305 (c) (2), Executive Order 9279), plaintiff was prevented from leaving his employment at the New York Naval Shipyard, and from obtaining private employment, at a time when he could readily have done so.

7. Defendant has established procedures for the discharge,

reduction in grade and pay, or laying-off of persons employed by the establishments of the Department of the Navy, including the New York Naval Shipyard, and has directed the preparation of "retention registers" to govern such personnel actions in the event of a reduction in force. Such registers are based upon "areas of competition", "retention groups", and "retention credits". Defendant has further directed that such retention registers be prepared in such manner as to distinguish those em-
25 ployees having veteran status from those who do not have such status. Veteran employees are designated as Group IA and employees without veteran status are designated as Group IB employees. Group I employees being composed of those employees serving under unlimited career appointments. Plaintiff has been designated as Group IB.

8. Purporting to act in pursuance of the provisions of Section 12 of the Act of June 27, 1944, as amended, 5 U.S. Code Sec. 861, defendant has directed that all employees classified as Group IB shall be discharged before any employees classified as Group IA is discharged or furloughed.

9. Section 12 of the Act of June 27, 1944, as amended, is arbitrary, unreasonable, and void, in that, in contravention of the requirements of the Fifth Amendment of the United States, it deprives plaintiff of his right to compete for retention in his present employment without due process of law, in that it arbitrarily deprives plaintiff of his right to seek and retain such employment.

10. As a result of the arbitrary and illegal action of the defendant herein complained of, plaintiff will suffer grave and irreparable damage for which he has no adequate remedy at law. Plaintiff was discharged from employment in which he had served for more than 19 years and will lose the wages from such employment. By reason of his age of 49 years, plaintiff cannot obtain other employment at an equivalent rate of pay, although he has used his best efforts to find such employment, with the result that plaintiff will lose wages and will lose steady employment. The loss occasioned to the plaintiff by the illegal act of the defendant is not susceptible of calculation, but will exceed the sum of

$3,000.00.

WHEREFORE, plaintiff demands judgment for a preliminary
26 and permanent injunction restraining the defendant, his agents, servants and employees, and all persons in active concert and participation with them or any of them from discharging plaintiff from his employment in accordance with any rules purportedly based upon Sec. 12 of the Act of June 27, 1944, as amended, and requiring the defendant to restore plaintiff to his employment as aforesaid, and for such other and further relief as may be just and equitable.

/s/ Carl W. Berueffy
Attorney for Plaintiff

* * *

---

27 [Filed July 16, 1956]

ANSWER

Defendant answers to complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the complaint.

2. Defendant admits the allegations contained in paragraph 2 of the complaint except that he alleges that plaintiff has been employed at the New York Naval Shipyard since August 12, 1936.

3. Defendant admits the allegations contained in paragraph 3 of the complaint.

4. Defendant admits the allegations contained in paragraph 4 of the complaint.

5. Defendant admits the allegations contained in paragraph 5 of the complaint.

6. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint and therefore denies them.

7. Defendant admits the allegations contained in paragraph 7 of

the complaint but alleges further that the regulations spoken of are in accordance with the Veterans Preference Act and Civil Service Regulations.

8. Defendant admits the allegations contained in paragraph 8 of the complaint but alleges further that he has in fact acted under statutory authority and pursuant to Civil Service Regulations in setting up
28 discharge and furlough procedures.

9. Defendant denies the allegations contained in paragraph 9 of the complaint.

10. Defendant denies the allegations contained in paragraph 10 of the complaint but admits that plaintiff was demoted as a result of a reduction in force.

Additional Defenses

1. The complaint fails to set forth a justiciable case or controversy.

2. Plaintiff has no standing to sue. He has neither been discharged nor is his discharge now contemplated. Also plaintiff is in competition for reduction in force purposes only with one other employee, also a non-veteran, and so the Veterans Preference Act has had no effect on this plaintiff whatsoever.

3. The complaint fails to state a claim against defendant upon which relief can be granted.

/s/ George Cochran Doub
Assistant Attorney General
/s/ Oliver Gasch
United States Attorney
/s/ Edward H. Hickey
Attorney, Department of Justice
/s/ Donald B. MacGuineas
Attorney, Department of Justice
/s/ Charles J. Steele
Attorney, Department of Justice
Attorneys for the Defendant

29 (Certificate of Service)

30 [Filed Dec. 19, 1956]

WESLEY D. WHITE, Plaintiff, v. CHARLES S. THOMAS, Secretary of the Navy, Defendant.	)	Civil Action No. 450-56
DOCTOR R. WINTER, FREDERICK P. BLUROCK, HERBERT B. HAMMOND, JAMES WILLIAMS, CHRISTOPHER WRIGHT, Plaintiffs, v. CHARLES S. THOMAS, Secretary of the Navy, Defendant.	)	Civil Action No. 1869-56
EDGAR W. PITTS JOSEPH A. MURRAY, Plaintiffs, v. WILBUR M. BRUCKER, Secretary of the Army, Defendant.	)	Civil Action No. 1870-56
GEORGE R. PHILLIPS, Plaintiff, v. CHARLES S. THOMAS, Secretary of the Navy, Defendant.	)	Civil Action No. 1871-56

MOTION FOR SUMMARY JUDGMENT

Defendants move the Court to enter, pursuant to Rule 56, Federal Rules of Civil Procedure, a summary judgment in each case in favor of the defendant:

1. Dismissing the action of White, No. 450-56, and the action No. 1869-56 as to Blurock, Hammond, Williams and Wright on the

grounds that they have no standing to invoke the jurisdiction of this Court.

31 2. Dismissing each action on the ground that it fails to state a claim upon which relief can be granted.

/s/ George Cochran Doub
Assistant Attorney General
/s/ Oliver Gasch
United States Attorney
/s/ Donald B. MacGuineas
/s/ David L. Rose
Attorneys, Department of Justice
Attorneys for Defendants.

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32 [Filed Dec. 19, 1956]

[AFFIDAVIT OF E. C. FIGG]

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Personally appeared before me E. C. Figg , Industrial Relations Assistant, Industrial Relations Department, Charleston Naval Shipyard, U.S. Naval Base, Charleston, South Carolina, who, being duly sworn, says:

That the official personnel records on file in the Industrial Relations Department show that Doctor R. Winter was initially employed at the Charleston Naval Shipyard as a Helper Woodworker on 29 June 1917. He subsequently was changed to Helper General and resigned on 9 December 1921. That he was given a temporary appointment as Helper Shipfitter on 2 March 1935 which was terminated on 17 April 1935. That he was given a probational appointment as Helper Shipfitter on 5 March 1935 and has remained continuously employed to date.

That on 3 April 1956, Doctor R. Winter was issued a notice of separation because of reduction in force. This notice stated that his

last day of work would be 11 May 1956 and his day of separation would be 2 July 1956. That at the time this notice was issued, Doctor R. Winter held the rating of Leadingman Shipfitter at $5,969.60 per annum and stood on the bottom of the reduction in force retention register in reduction in force retention group IB. That the records indicate that Doctor R. Winter is not entitled to veterans preference.

That on the reduction in force retention register there were fifteen (15) employees who had less creditable service than Winter whose name appeared ahead of Winter's name due to the fact that they were entitled to veterans preference.

That on 21 May 1956, Doctor R. Winter was, as a result of the exercise of displacement rights under reduction in force regulations, demoted to Shipfitter at $2.30 per hour.

SWORN TO AND SUBSCRIBED before me this 2nd day of July A.D., 1956.

/s/ Fleming D. Ackerman /s/ E. C. Figg

Notary Public for South Carolina

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33 [Filed Dec. 19, 1956]

[AFFIDAVIT OF E. B. POWELL]

CITY OF WASHINGTON)

DISTRICT OF COLUMBIA)

Personally appeared before me E. B. Powell, Jr., Labor Relations Advisor, Office of Industrial Relations, Navy Department, Washington, D.C., who, being duly sworn, says:

FREDERICK P. BLUEROCK was initially employed at the Charleston Naval Shipyard as a Machinist on 5 December 1939 and has been continuously employed since that date. He presently holds the rating of Shop Analyst and Scheduler (Machinist) at $2.76 per hour. The records indicate that Bluerock is not entitled to veterans preference. On 10 April 1956, Bluerock was issued a notice of separation because of

reduction in force. His last day of work was scheduled as 1 June 1956 and his separation was to be effective on 2 July 1956. On the reduction in force retention register for Shop Analyst and Scheduler (Machinist), Bluerock's name stood fourth from the bottom of the register in reduction in force retention group IB. There were sixteen employees with less creditable service whose names appeared ahead of Bluerock's on the register due to their veterans preference. On 16 May 1956, due to an unexpected increase in workload, Mr. Bluerock's notice of separation due to reduction in force was cancelled.

HERBERT B. HAMMOND was initially employed at the Charleston Naval Shipyard on 28 April 1936 as a Helper Boilermaker and has been continuously employed since that date. The records indicate that he is not entitled to veterans preference. Hammond presently holds the rating of Leadingman Welder (Electric) at $5,740.80 per annum. On 3 April 1956, Mr. Hammond was issued a notice of separation because of reduction in force, his last day of work to be 11 May 1956 and his date of separation to be effective on 2 July 1956. Mr. Hammond's name appeared two from the bottom of the register for Leadingman Welder (Electric). He is in reduction in force retention sub-group IB. There were four employees with less creditable service than Hammond whose names appeared higher on the register due to veterans preference. Due to retirement of another Leadingman Welder (Electric), Hammond's reduction in force notice was cancelled on 17 April 1956.

JAMES WILLIAMS was initially employed at the Charleston Naval Shipyard as a Laborer Common on 31 January 1934 and discharged on 9 July 1934. He was reinstated on 1 May 1935 as an Unclassified Laborer Common. He was classified under the Ramspeck Act on 1 June 1943 and has remained in the employ of the Shipyard to date. He presently holds the rating of Helper Machinist at $1.53 per hour. The records indicate that he is not entitled to veterans preference. On 10 April 1956, a notice of separation because of reduction in force was issued to James Williams, last day of work to be 1 June 1956 and separation to be ef-

34 fective on 2 July 1956. Williams' name appeared in retention

sub-group IB, eleventh from the bottom of the retention register for Helper Machinist. There were thirty-six employees with less creditable service than Williams whose names appeared above his on the retention register due to veterans preference. On 16 May 1956, due to an unexpected increase in the workload, Williams' notice of reduction in force was cancelled.

CHRISTOPHER WRIGHT was initially employed at the Charleston Naval Shipyard as a Laborer Common on 20 April 1933. He was classified under the Ramspeck Act on 1 May 1943, and has remained an employee of the Shipyard to date. He presently holds the rating of Helper Machinist at $1.53 per hour. The records indicate that Wright is not entitled to veterans preference. On 10 April 1956, a notice of separation because of reduction in force was issued to Wright, the last day of work was scheduled for 1 June 1956 and separation to be effective on 2 July 1956. Wright's name appeared fourteenth from the bottom of the retention register for Helper Machinist in reduction in force retention sub-group IB. There were thirty-six employees with less creditable service than Wright whose names appeared above his on the retention register due to veterans preference. Due to an unexpected increase in the workload, Wright's notice of reduction in force was cancelled on 16 May 1956.

SWORN TO AND SUBSCRIBED before me this 5th day of July A.D., 1956.

/s/ E. B. Powell, Jr.

/s/ Madeline MacDonald
Notary Public, D.C.

My Commission expires March 14, 1961.

35 [Filed Dec. 19, 1956]

GEORGE R. PHILLIPS,)
Plaintiff)
v.) Civil Action No. 1871-56
CHARLES S. THOMAS,)
Secretary of the Navy,)
Defendant)

AFFIDAVIT OF JOSEPH R. SCIMECA

36 State of New York
City of New York
County of Kings, ss:

I, JOSEPH R. SCIMECA, of 209 Clinton Avenue, Brooklyn 5, New York, being duly sworn, depose and state that:

1. I am employed by the New York Naval Shipyard, Brooklyn 1, New York in the capacity of Assistant Employment Superintendent, Industrial Relations Department.

2. I make this affidavit for the purpose of setting forth the facts relating to George R. Phillips versus Charles S. Thomas, U.S.D.C., D.C., Civil Action No. 1871-56.

3. The facts in this case are as follows:

a. On 24 February 1956, a 30 day notice of proposed separation because of reduction in force, due to lack of work, was issued to George R. Phillips, Planner and Estimator (Optical Instrument Maker), $24.16 p.d., third step, retention subgroup IB, retention credits 19.4, to be effective 30 March 1956.

b. On 1 March 1956, George R. Phillips was offered and accepted a change to lower grade to the position of Optical Instrument Maker, $20.80 per diem, third step, to be effective 2 April 1956, in lieu of reduction in force.

c. George R. Phillips is currently serving in the position of Optical Instrument Maker.

Sworn to before me this 11th day of May, 1956 /s/ Joseph R. Scimeca

/s/ Frank J. Bomm, Authorized by U.S.C.S.C. to administer oaths.

37 (Certificate of Service)

38 [Filed Dec. 19, 1956]

WESLEY D. WHITE,

Plaintiff,

v. Civil Action No. 450-56

CHARLES S. THOMAS,
Secretary of the Navy,

Defendant.

STIPULATION OF FACTS

It is hereby stipulated and agreed that:

Due to a reduction in the scheduled workload at the Charleston Naval Shipyard, reduction in force notices were issued to approximately 500 Shipyard employees during the month of April 1956. Due to an unforeseen increase in the workload, most of the outstanding reduction in force notices were cancelled on May 17, 1956.

Wesley D. White, employed at this Shipyard as a Pipefitter, Pay No. 56-13735, has not been issued a reduction in force notice and there is no indication he will be issued a reduction in force notice.

/s/ David L. Rose
Attorney for Defendant

/s/ Carl W. Berueffy
Attorney for Plaintiff

39 (Certificate of Service)

40 [Filed Feb. 7, 1957]

WESLEY D. WHITE, Plaintiff,	)	
v.	)	Civil Action No. 450-56
CHARLES S. THOMAS, Defendant.	)	
DOCTOR R. WINTER, et al., Plaintiffs,	)	
v.	)	Civil Action No. 1869-56
CHARLES S. THOMAS, Defendant.	)	
EDGAR W. PITTS, et al., Plaintiffs,	)	
v.	)	Civil Action No. 1870-56
WILBUR M. BRUCKER, Defendant.	)	
GEORGE R. PHILLIPS, Plaintiff,	)	
v.	)	Civil Action No. 1871-56
CHARLES S. THOMAS, Defendant.	)	

MEMORANDUM

This matter is disposed of not as a motion for summary judgment but as an application for the convention of a three-judge court, which is denied, the Court concluding no substantial constitutional question is presented. Wicks v. Southern Pacific Co., 231 F. 2d 130, 134, 135 (9th Cir.) 1956, citing California Water Service Co. v. City of Redding, 1938, 304 U.S. 252, 58 S. Ct. 865, 82 L. Ed. 1323.

41 Parenthetically, it may be said it has long been the policy of the Government, since the foundation of the Republic, to extend benefits to those who have risked their lives in the country's defense during wartime and statutes granting such benefits have always been construed

in broad and general terms. Apart from that, there has been a tremendous volume of litigation running back over a long period of years involving legislation of this character. Resourcefullness and diligence of counsel in search for authority to buttress position of plaintiffs has been barren in result. The matter cannot be resolved by conjecture, and constitutionality in the circumstances as a consequence must be presumed.

In this connection, the language of Mr. Justice Reed in Hilton v. Sullivan, 334 U.S. 323 at 339, is of moment. ". . . Congress passed the bill [Veterans' Preference Act] with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy."

Orders accordingly.

/s/ MATTHEW F. McGUIRE
United States District Judge

February 7, 1957

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42 [Filed March 1, 1957]

ORDER

Upon consideration of the plaintiffs' motion for consolidation of the above cases, and of the plaintiffs' application for the convening of a three-judge court and of the defendants' motions for summary judgment, it appears to the court that the above cases all raise the same issue: that they present no substantial constitutional question; that there are no genuine issues of material fact; and that the defendants are entitled to judgment as a matter of law in that the plaintiffs have failed to state a claim upon which relief can be granted, it is by this Court this 1st day of March, 1957;

43 ORDERED that the plaintiffs' motion for consolidation of the above cases be and is hereby granted, and it is

FURTHER ORDERED that the plaintiffs' application for the convening of a three-judge court be and is hereby denied, and it is

FURTHER ORDERED that the complaints be and they are hereby dismissed.

/s/ MATTHEW F. McGUIRE
DISTRICT JUDGE

Seen:

/s/ Carl W. Berueffy, Attorney for Plaintiffs

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44 [Filed April 27, 1957]

NOTICE OF APPEAL

Notice is hereby given that Wesley D. White, Doctor R. Winter, Herbert B. Hammond, James Williams, Christopher Wright, Edgar W. Pitts, Joseph A. Murray, and George R. Phillips, plaintiffs in the above entitled consolidated action, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on March 1, 1957.

/s/ Carl W. Berueffy
Attorney for Appellants

(Certification of Service)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 932

WESLEY D. WHEEL, DEXTER R. WINTERS, HERBERT B. HAMMOND, JAMES WILLIAMS, CHRISTOPHER WRIGHT, EDGAR W. PETTS, JOSEPH A. MURRAY, and GEORGE R. PHILLIPS,

Petitioners,

v.

CHARLES S. THOMAS and WILLIAM M. BRADLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL W. BRADLEY
1625 Eye Street, N. W.
Washington, D. C.

EUGENE GRESSMAN
1700 K Street, N. W.
Washington, D. C.

Counsel for Petitioners

April 28, 1958

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2. A novel and substantial question is raised as to whether the challenged proviso of Section 12 is a legislative infringement of the power granted by the Constitution to the Executive	12
3. The foregoing constitutional questions are important in the administration of the civilian service of the federal government and vitally affect the employment of some two million employees of the federal government. The entire system of merit in government is at stake	14
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

WESLEY D. WHITE, DOCTOR R. WINTER, HERBERT B. HAMMOND, JAMES WILLIAMS, CHRISTOPHER WRIGHT, EDGAR W. PITTS, JOSEPH A. MURRAY, and GEORGE R. PHILLIPS,

Petitioners,

v.

CHARLES S. THOMAS and WILBUR M. BRUCKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Wesley D. White, Doctor R. Winter, Herbert B. Hammond, James Williams, Christopher Wright, Edgar W. Pitts, Joseph A. Murray, and George Phillips pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 23, 1958.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the trial court, printed in Appendix A hereto, *infra*, p. 1a, is unreported. The opinion of the Court of Appeals, printed in

Appendix B hereto, *infra*, pp. 2a to 7a, is reported in .... F. 2d ..... It is not yet reported in the U. S. App. D. C. reports.

JURISDICTION

The judgment of the Court of Appeals was entered January 23, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether an Act of Congress which requires that no civil service employee having veterans' preference status may be discharged in a reduction-in-force so long as a civil service employee without such status is retained in a competing employment, is an arbitrary and unreasonable discrimination against such non-preference employees, and, if so, whether such discrimination violates the due process clause of the Fifth Amendment to the Constitution of the United States?

2. Whether the absolute requirement of the retention of an employee having veterans' preference, and the consequent prohibition of the consideration of any other factors, such as experience, skill, seniority, or efficiency by the executive officers, is a legislative infringement of the executive power, and therefore a violation of the doctrine of separation of powers?

3. Whether a single judge of a United States District Court exceeds his authority, as limited by 28 U. S. C., Section 2284, by refusing to summon a three-judge court and dismissing a suit instituted by federal employees to enjoin, upon the ground of unconstitutionality, the enforcement and operation of Sections 12 of the Veterans' Preference Act of 1944, the constitutionality of which has never been passed upon by this Court?

STATUTES INVOLVED

The statutory provision involved in this action is Section 12 of the Veterans' Preference Act of 1944 (5 U. S. Code, Section 861, 58 Stat. 390, Act of June 27, 1944), which provides as follows:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided:* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further:* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: * * *

STATEMENT

These suits were instituted by the petitioners, who sought injunctive relief against the threatened loss of their government employment as the result of the application of Section 12 of the Veterans' Preference Act of 1944, which statute the petitioners alleged to be unconstitutional and void. The cases were argued together and consolidated in the District Court [R., p. 31]. The single district judge denied the petitioners' application for the convening of a three-judge district court and dismissed the complaints [R., p. 31].

All of the petitioners are employed as civilian employees in military and naval establishments. All have civil service status.

The effect of the provision of Section 12 of the Veterans' Preference Act and its absolute requirement that employees with preference status be retained and that competing employees without such status be reduced-in-force is summarized in the following table:

Petitioner	Initial Employment	Job Title	Preference employees with fewer retention credits [1]
White	1929	Pipefitter	Not stated
Winter	3/2/1935	Leading Man Shipfitter	15
Hammond	4/28/1936	Leading Man Welder	4
Williams	5/1/1935	Laborer	36
Wright	4/20/33	Helper Machinist	36
Phillips	8/—/1936	Planner and Estimator	
Murray	18 years 10 months	Filer	8
Pitts	11/23/1926	Machining Inspector	47

Each of the petitioners had been employed at the respective establishments at the beginning of World War II. Each of them was, during the war periods, frozen in the essential employments in which he was engaged.[2] In the case of White, he had been drafted into the Navy and inducted [R., pp. 1, 4], but was immediately furloughed so that he could remain at his work at the Navy installations at Pearl Harbor. Phillips had, during the war, attempted to volunteer for the armed services, but was held by the War

[1] Retention credits are the numerical method of calculating the factors of seniority and performance. The Federal Personnel Manual, ch. R-3, "Reduction in Force," p. R-3-16, defines reduction credits as " • • • numerical credits given for length of Government service and for performance ratings. One credit is given for each full year of Government service; four credits are given for a current official 'outstanding' performance rating; • • •"

[2] 29 CFR, Cumulative Supplement, 1943, Sec. 904.1 *et seq.* 32 CFR, Cumulative Supplement, 1943, Sec. 624.4. Executive Orders Nos. 9139 and 9279.

Labor Board to be essential in his civilian work, and was refused permission to leave the New York Naval Shipyard so that he could volunteer [R., p. 18].

Each of the respondents admits [R., pp. 4, 10, 11, 13, 14, 27] that he has taken steps which affect the employment of the various petitioners, and asserts his intention of applying the provisions of the challenged section against the petitioners, and all employees similarly situated. The extent to which the statute has been applied in the individual cases varies with the various petitioners. All of them have been affected by the establishment of registers under which they cannot be retained in government employment in competition with employees having veterans' preference. Pitts and Murray have actually been discharged from their employment [R., pp. 15, 16]. Phillips has suffered a substantial reduction in grade and pay [R., p. 27], as has Winter [R., p. 24]. Hammond, Williams, and Wright received notices of termination, but these notices were cancelled after the institution of the actions in the District Court [R., pp. 25, 26].

The Government moved to dismiss each of the cases, and these motions were heard and determined by the single judge of the District Court [Appendix A., *infra*, p. 1a]. The trial court refused to summon a three-judge district court on the ground that there was no substantial issue as the constitutionality of the challenged section [R., pp. 30, 31], and dismissed the actions.

The Court of Appeals affirmed this ruling [R., p. 34] in a divided decision, Judge Prettyman dissenting.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case has decided important questions of federal law which have not been, but should be, decided by this Court. The questions of the constitutional validity of the second proviso of Section 12 of the Veterans' Preference Act of 1944 affect the employment of the entire personnel of the federal civil service, and petitioners submit that the decision of the Court of Appeals is an erroneous construction of the rights of federal employees and of the power of the Congress to infringe upon the prerogatives of the Executive. While the majority of the Court of Appeals found no substantial issue of constitutionality, the dissenting judge emphasized the importance of the question in this language (Appendix, *infra*, p. 7a):

> I would hope the Supreme Court will take this case, which lies in the "field of doubt" it forecast in the Humphrey's opinion. Dire results are predicted to us if the present peremptory proviso gradually causes the civilian service of the Government to be manned by veterans of substantially less qualifications than experienced non-veterans.

1. A novel and substantial question is raised as to the validity under the due process clause of the Fifth Amendment of the second proviso of Section 12 of the Veterans' Preference Act of 1944.

This Court has made it plain that the power of Congress over the conditions of federal employment, while broad, is not unlimited. It is likewise clear that, although governmental employment is still regarded as a "privilege", any person has a constitutionally protected right not to be excluded arbitrarily from governmental employment in violation of constitutional provisions. *United States* v. *Lovett*, 328 U. S. 303; *United Public Workers* v. *Mitchell*, 330 U. S. 75. The full effect of this principle has been made plain in

Wieman v. *Updegraff*, 344 U. S. 183, 191-192, where this Court said:

> * * * in United Public Workers, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'' 330 US at p. 100. See also, In re Summers, 325 US 561, 571. We need not pause to consider whether an abstract right to public employment exists. *It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.* (Emphasis supplied.)

This principle was reiterated and reinforced in *Slochower* v. *Board of Education*, 350 U. S. 551, in which this Court prohibited the discharge of a public employee for an invalid reason. The *Slochower* decision placed the basis for the protection squarely within the due process clause. The Court there said (p. 559):

> There has not been "the protection of the individual from arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process. *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302.

It is on the grounds of arbitrary action within the meaning of the due process clause of the Fifth Amendment that the petitioners have challenged the validity

of the second proviso of Section 12 of the Veterans' Preference Act of 1944. That proviso reads:

> * * * *Provided further*, that preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *[1]

The effect of this provision is that any preference employee who can remain on the federal payroll has an absolute right to displace any competing non-preference employee, even one with the highest possible efficiency rating and even one with greater seniority, skill or merit.

As a result of the application of the foregoing proviso, two of the petitioners were discharged from the federal service, two have suffered substantial reductions in grade and pay, and the remainder are immediately threatened with the loss of their employment despite the fact that their skill and seniority, as measured by the retention credit system, are greater than those of the war veterans whose employment has not been affected. The petitioners lost, or are threatened with losing, their jobs simply because they lacked the preference accorded war veterans. And they lacked the status of war veterans because they had been employed in essential industries and establishments during World War II and were thereby precluded, by action of the government, from entering the armed forces and acquiring the essential veterans' status.

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[1] This section was amended, *pro tanto*, by the Act of September 30, 1950, Section 6, 64 Stat. 1099, 5 U. S. C. 2005, to provide for only three ratings, "Outstanding", "Satisfactory" and "Unsatisfactory." An "Unsatisfactory" rating, after warning, requires the dismissal of the employee.

The unconstitutional arbitrariness adhering to the second proviso of Section 12 is evident from the fact that it plainly discriminates against those non-veteran employees who possess greater efficiency, seniority and merit than competing employees with veterans' preference. It adopts an arbitrary formula whereby former military service overrides every other consideration in the retention of public employees. As stated in *Commonwealth ex rel. Graham* v. *Schmid*, 333 Pa. 568, 3 A. 2d 701:

> . . . But, on the other hand, where war service is appraised beyond its value, and the preference goes beyond the scope of the actual advantages gained in such service, the classification becomes void and the privilege is held unreasonable and arbitrary. Public policy demands such a rule of law. It is essential to the administration of public affairs that governmental employees be selected on the basis of their ability to perform the duties imposed upon them in an efficient manner, and if public servants are not selected on this basis, the appointing power violates its oath of office; where the legislature so provides, it offends the constitutional mandate.

It should be noted that petitioners' challenge here does not involve a general attack upon all privileges and preferences accorded to veterans. The Veterans' Preference Act provides for certain point advantages upon a veteran's initial entry into governmental service. The first proviso of Section 12 provides for a consideration of veterans' status, along with other relevant facts, in determining which employee should be discharged. It affords a further advantage to the veteran by requiring that the time spent in military service, no matter how unrelated to governmental em-

ployment, be counted as a part of longevity. To this extent, the statute reaffirms the traditional preference of veterans. Of this the petitioners make no complaint. In the words of Mr. Justice Cardozo in *Berthelmess* v. *Cukor*, 231 N. Y. 435, 132 N. E. 140:[1]

> . . . [The Legislature] may say that military or naval service . . . is something to be counted by the examiners, like experience in other fields, . . . Service so considered does not override the results of competitive examination, but enters into the results as a contributory factor. A different situation arises when service controls selection, irrespective of qualifying value. It is the difference between an appraisal of merit, an estimate of fitness, and a preference or bonus.

Thus it is the situation "when [war] service controls selection, irrespective of qualifying value"—the situation which characterizes the second proviso of Section 12—about which the petitioners complain. It is that situation which caused the President's Commission on Veterans' Pensions, after a thorough study, to conclude:

> Preference in retention during reductions in force for non-disabled veterans has no real rela-

[1] The Court of Appeals relied upon *Matter of Gianatasio*, 357 N. Y. 531, 178 N. E. 782, appeal dismissed for want of a substantial federal question, *Gianatasio v. Kaplan*, 284 U. S. 595, as demonstrating that the present suit did not present a substantial constitutional question of discrimination. Considered in the light of *Berthelmess* v. *Cukor*, *supra*, it is clear that the *Gianatasio* case does not stand for the proposition that an arbitrary formula in which former military service overrides every other consideration is a valid exercise of the legislative power under the due process clause. Contrariwise, the New York rule is clearly in support of the petitioners' position that while a preference between equals is constitutionally acceptable, the retention of the veteran despite all other considerations is an arbitrary discrimination.

> tion to readjustment needs and does violence to the basic principles of the Federal merit system. The goals of open competition and equal treatment for all, on the basis of their ability to serve the public as employees, cannot be achieved if there is arbitrary discrimination in favor of one group based on factors having nothing to do either with their efficiency or with their readjustment needs as veterans.

The classification created by the second proviso of Section 12 is without reason or guiding principle. It creates two classes of governmental employees, the rights of one class being absolutely superior to the other. The classification depends entirely upon such fortuitous circumstances as time of birth, misfortunes of physical handicaps or the act of the government itself—the circumstances which determine whether one has a chance to acquire veterans' status. One does not achieve the preferred status by any act or failure to act over which he has any real control.

To say, as did the District Court, that this discrimination is justified as a bonus or pension is to distort the very nature of governmental employment. Such employment is not in any meaningful sense the equivalent of a bonus or pension or largess. And it is logically wrong to identify the grant of a pension with the privilege of absolute retention, irrespective of qualification, in the government service. Pensions and other grants are provided from public funds supplied by taxpayers generally; the burden thus imposed on any one citizen is undoubtedly *de minimis*. But the impact of the privilege of absolute retention of a war veteran falls directly upon the employee lacking veterans' status. Such an employee may, as did the petitioners here, lose his livelihood after long and honor-

able service in the government. The serious consequences that thus ensue are characteristic of an unconstitutional discrimination rather than of a bounty or bonus.

The precise constitutional issue thus raised is a substantial one that finds no definitive or controlling answer in the prior decisions of this Court. The discrimination created by the second proviso of Section 12 is so plain and so unwarranted as to make review by this Court necessary and appropriate. The principle that governmental employees are constitutionally protected against arbitrary and unreasonable discharges is too important to be ignored in light of the plain challenge contained in that second proviso.

2. A novel and substantial question is raised as to whether the challenged proviso of Section 12 is a legislative infringement of the power granted by the Constitution to the executive.

The Constitution provides that "The executive Power shall be vested in a President of the United States" (Art. II, Sec. 1, cl. 1) and authorizes Congress by law to vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments (Art. II, Sec. 2, col. 2).

The power of removal from office is, however, a matter which is completely different from the power of appointment. The Constitution, in fact, makes no mention of the power of removal. As to an executive officer, restricted to the performance of executive functions, the power of removal is implied from the power of appointment, and is necessarily an executive prerogative. *Myers* v. *United States*, 272 US 52. *Re Hennen*, 13 Pet. 230, 259; *Parsons* v. *United States*, 167 US 324; *Marbury* v. *Madison*, 1 Cranch 137, 167.

Notwithstanding the decision in *Humphrey's Executor* v. *United States*, 295 US 602, in which a different rule was enunciated with respect to a *quasi*-judicial officer, the power to remove an executive officer is that of the executive, and is a power necessarily implied from the constitutional duty of the President to "take care that the Laws be faithfully executed."

It is obvious that the President can not by himself enforce the laws, but must act through executive subordinates. From the responsibility flows the power to supervise the acts of these subordinates, and to remove those who are not competent. Likewise, when the number of such subordinates is required to be reduced from lack of funds or other reasons, the executive must exercise his discretion with respect to whom he will retain and whom he will discharge, for without the authority to exercise such discretion, the President cannot fairly be held to the responsibility for the faithful enforcement of the laws. It was the theory of the authors of the Constitution that this discretion would be exercised by the President on the basis of merit alone. In fact, James Madison suggested in the congressional debates of 1789 that the act of the President in removing a meritorious officer to effect his replacement by a less meritorious one would be an act of maladministration which would warrant the impeachment of the President.

The question then is, to what extent can Congress require the executive to dismiss a more qualified officer in order to retain a less qualified one? The constitutional principles which led to the determination in the *Myers* case, *supra*, that the removal of a purely executive officer was a purely executive function compel the conclusion that the discretion as to which of

two competing employees shall be removed is an executive responsibility, which must be exercised by the executive. An attempt by Congress to require the executive to disregard merit, or to prevent the exercise of the executive discretion, is at war with the fundamental doctrine of the separation of powers.

The mandatory language of Section 12 is designed to prevent the exercise of this executive discretion. As was noted by the dissenting judge of the Court of Appeals, the language of this section is the only language in any of the statutes relating to the civil service which is thus mandatory. All others are cast in the mold of advisory aids to the President. The advisory language is no impingement upon the executive power, since the ultimate discretion still reposes in the executive. Section 12, in its mandatory form, is such an invasion of the executive power. In unvarnished terms, it seeks to require the President to violate his oath of office by requiring him to retain officers of lesser competency—an act fundamentally at variance with his duty to take care that the laws are enforced.

Section 12 is necessarily an infringement of the executive power and is therefore unconstitutional. As such, it necessitates full consideration and deliberation by this Court.

3. The foregoing constitutional questions are important in the administration of the civilian service of the federal government and vitally affect the employment of some two million employees of the federal government. The entire system of merit in government is at stake.

The selection and retention of those best qualified for employment in the civil service positions in the executive department is a matter of grave concern to all citizens, as well as those who are more directly

concerned as government employees. Employees have a constitutional right to be protected against arbitrary exclusion from opportunities for retaining government employment. This right, because of the constantly increasing importance of government employment in our economic life, must be of increasing concern and judicial protection.'

Although since the close of the Civil War, those who had served in the armed forces were accorded a preference in government employment, it was not until the challenged Act of 1944 that the provision for the absolute retention of veterans became a part of the Civil Service system. The American Assembly, *The Federal Government Service*, p. 132 (Columbia University, New York 1954).

The number of government employees actually affected by this provision is of significance. Recent statistics of government employment show the number of government employees whose positions are jeopard-

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[1] The govern..ent's importance as an employer almost doubled, from an arithmetical standpoint during the fifteen years between 1939 and 1954, as is shown by the following statistics:

Year	Total Civilian Employment (in thousands)	Government Employment (in thousands)	Ratio
1939	45,750	944	2.32
1944	54,630	3,342	6.13
1949	58,710	2,083	3.55
1954	61,228	2,494	4.06

Source of data: Statistical Abstract of U. S.

The increased importance of government employment because of the govern-ment's domination of certain crafts because of military production is not, of course, susceptible of measurement, but is a matter of ordinary daily observation.

ized by the enforcement of the absolute retention preference:

	Government Employees Continental U. S.		Veterans		Percent Veteran	
	Total (in thousands)	Male	Total (in thousands)	Male	Total	Male
1952	2,374	1,786	1,107	1,080	47	60
1953	2,193	1,663	1,059	1,034	38	63
1954	2,154	1,626	1,046	1,021	48	63
1955	2,152	1,639	1,056	1,031	50	63

Source of data: Statistical Abstract of U. S.

The increasing number of veterans, especially among the male employees of the federal government, makes it abundantly clear that the Act of 1944 is, in fact, the means of creating a monopoly for veterans in the government service, and will eventually result in the total exclusion of non-veterans from the government service. The constitutional validity of the exclusion from federal employment of more than half of the citizens of the United States is, we believe, a question of vital importance in the administration of the federal service.

> A principal reason for this trend upwards is undoubtedly the provisions for reduction in force. Fewer veterans are dropped. Probably also, fewer non-veterans are enticed into insecure jobs. * * *
>
> These trends may be compared with the increase of veterans in the total population. A rough comparison of the government with the society outside the government shows that already veterans' preference has had a disproportionate impact. Of the total labor force in the United States, veterans comprise about 30 per cent. Of the total force of the Federal Government, they comprise about 50 percent.
>
> —The American Assembly, *The Federal Government Service*, pp. 138, 139.

Although the importance of the question is substantial because of the impact on the individuals who, usually at an advanced age, are deprived of employment in which they have served efficiently for many years, even more important is the impact on the government service staff. No impartial organization which has studied the impact of this law during the last 18 years has failed to conclude that the proviso is damaging to the government. The American Assembly has said:

> Unquestionably the most serious current problem of preference arises from the procedure for Federal reductions in force. The resulting upsets have gone to the very fabric of agency organization and morale. It is doubtful that many private organizations have endured and survived such internal convulsions. * * * [The upsets] have shaken the morale and the feeling of security of thousands of other employees and the interest and faith in the government as employer among many thousands outside the government. Some of the best public servants have been fired or "bumped;" many others have voluntarily left the service; perhaps many thousands of others have been discouraged from seeking Federal employment. This situation has led the National Civil Service League to label veterans' preference as "perhaps the most serious obstacle in the way of efficient managing of Federal personnel today."
>
> —The American Assembly, *The Federal Government Service*, p. 139.

The same conclusion was reached by the Senate Post Office and Civil Service Committee after an exhaustive study of the effect of the Veterans' Preference Act of 1944. Its report stated:

> . . . The result is that Government is gradually losing many of its most experienced and highly

> skilled employees. Moreover, arsenals, ordinance laboratories and plants, and navy yards report that they cannot recruit skilled men for these positions, and former employees who have been laid off in reductions, will not return to Government employment as a consequence of this basic inequity in competing for retention. * * *
>
> —"Reduction-in-Force System in the Federal Government," Senate Report No. 2102, 82d Congress, 2d Session, p. 24 (1953A).

The questions of the constitutional validity of Section 12 of the Veterans' Preference Act of 1944 are important questions which should be determined by this Court, both because of the impact of the statute upon the more than one million federal civilian employees who do not have preference status, and because of its adverse effect upon the efficiency and morale of the civilian staff of the government and upon the conduct of the business of the government. This basic importance of the questions is of greater concern because, we believe, the decision of the Court of Appeals was erroneous in principle.

4. In view of the substantial constitutional questions involved, the District Court erred in refusing to summon a three-judge court.

A three-judge district court must be convened where, as here, an attempt is made to obtain an "interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States." 28 U. S. C. 2282. And where a three-judge court is thus necessary, a single judge is without jurisdiction to dismiss the complaint on the merits or to grant or deny an interlocutory or permanent injunc-

tion or to do anything else not specifically authorized by 28 U. S. C. 2284. *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 15.

It is essential to the proper invocation of the three-judge court procedure, of course, that the constitutional questions raised be substantial. *Ex parte Poresky*, 290 U. S. 30. "The lack of substantiality in a federal question may appear either because it is so obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255.

The constitutional questions heretofore discussed demonstrate conclusively that they possess more than adequate substantiality so as to require the convening of a three-judge court. It cannot be said that the question of the arbitrariness of the discrimination against non-veteran government employees is so obviously without merit or its unsoundness so clearly demonstrated from past decisions of this Court as to foreclose the question. Nor can such conclusions be drawn as to the issue relative to the legislative invasion of the executive power, an issue that compelled one of the judges of the Court of Appeals to dissent from the majority's statement that the complaint failed to raise a substantial constitutional question.

It necessarily follows that the District Court erred in refusing to convene a three-judge court and that it lacked jurisdiction to dismiss the complaint. And the Court of Appeals erred in failing to correct this jurisdictional defect and to insist upon the utilization of the three-judge court procedure. *Stratton* v. *St. Louis Southwestern R. Co.*, *supra*. Further review by this

Court is thus essential so that the jurisdictional problems can be properly resolved.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

April 18, 1958

APPENDIX A.

Memorandum

This matter is disposed of not as a motion for summary judgment but as an application for the convention of a three-judge court, which is denied, the Court concluding no substantial constitutional question is presented. *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 130, 134, 135 (9th Cir.) 1956, citing *California Water Service Co.* v. *City of Redding*, 1938, 304 U. S. 252, 58 S. Ct. 865, 82 L. Ed. 1323.

Parenthetically, it may be said it has long been the policy of the government since the foundation of the Republic, to extend benefits to those who have risked their lives in the country's defense during wartime and statutes granting such benefits have always been construed in broad and general terms. Apart from that, there has been a tremendous volume of litigation running back over a long period of years involving legislation of this character. Resourcefulness and diligence of counsel in search for authority to buttress position of plaintiffs has been barren in result. The matter cannot be resolved by conjecture, and constitutionality in the circumstances as a consequence must be presumed.

In this connection, the language of Mr. Justice Reed in *Hilton* v. *Sullivan*, 334 U. S. 323 at 339, is of moment. ". . . Congress passed the bill [Veterans' Preference Act] with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy."

Orders accordingly.

/s/ MATTHEW F. MCGUIRE
United States District Judge

February 7, 1957

APPENDIX B.

Opinion of the Court of Appeals

EDGERTON, *Chief Judge:* These appeals are from an order which dismissed several complaints of non-veteran government employees or former employees alleging that the Veterans Preference Act, 58 Stat. 390, 5 U. S. C. § 861, discriminates against them in violation of their constitutional rights. We agree with the District Court that there is no substantial constitutional question.

Veterans' preference in federal employment has been an established policy of Congress for many years. Encouragement and reward of military service are its rational basis. If it is unwise and costly, this does not make it unconstitutional. The Supreme Court and other courts have enforced it, and have done so without suggesting any possible constitutional difficulty. *E.g., Hilton* v. *Sullivan,* 334 U. S. 323; *Reynolds* v. *Lovett,* 91 U. S. App. D. C. 276, 201 F. 2d 181, *cert. denied, Wilson* v. *Reynolds,* 345 U. S. 926.

In a one-line per curiam opinion the New York Court of Appeals, of which Justice Cardozo was then Chief Judge, affirmed a lower court's decision that a preference for veterans in *State* employment did not violate non-veterans' constitutional rights. *Matter of Gianatasio,* 257 N. Y. 531, 178 N. E. 782. Without comment, the United States Supreme Court dismissed an appeal from the Court of Appeals "for the want of a substantial federal question." *Gianatasio* v. *Kaplan,* 284 U. S. 595.

If veterans preference legislation conflicted with the President's constitutional prerogative, so would much of the Civil Service legislation that has been in force for many years. More than 70 years ago the Supreme Court said: "'We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The con-

stitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.'" *United States* v. *Perkins*, 116 U. S. 483, 485 (1886). In *Myers* v. *United States*, decided in 1926, the Court observed that it had "recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal." 272 U. S. 52, 161. And even if the President were free to ignore such regulations he would still be free to comply with them. Through his subordinates, he is complying and defending compliance in this case.

Wtihout convening a three-judge court, 62 Stat. 968, 28 U. S. C. §§ 2282, 2284, a single judge may dismiss a complaint that attacks the validity of an Act of Congress but fails to raise a substantial constitutional question. *California Water Service Co.* v. *Redding*, 304 U. S. 252; *Otten* v. *B. & O. R. Co.*, 205 F. 2d 58 (2d Cir. 1953); *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 130 (9th Cir. 1956), *cert. denied*, 351 U. S. 946. The District Court rightly dismissed the complaints for this reason. We need not consider whether some of them were subject to dismissal for other reasons also.

Affirmed.

PRETTYMAN, *Circuit Judge*, dissenting: I dissent because I think a substantial constitutional question is raised. I would remand for consideration by a statutory three-judge District Court.

I recognize the significance of cases of which *Hilton* v. *Sullivan*[1] is the outstanding example. In that case the Supreme Court, affirming this Court,[2] held the regulations

[1] 334 U. S. 323, 92 L. Ed. 1416, 68 S. Ct. 1020 (1948).

[2] *Hilton* v. *Forrestal*, 83 U. S. App. D. C. 44, 165 F. 2d 251 (1947).

issued by the Commission under the statutory proviso here involved to be valid. But the constitutional question was not discussed in the opinion of either Court. And it is the constitutional question which is now pressed upon us.

The second proviso in Section 12 of the Veterans' Preference Act[3] is a peremptory restriction placed by the Congress upon the power of the President in respect to retaining or dismissing purely executive employees in the Government. The proviso, in conjunction with its principal clause, reads: "In any reduction in personnel in any civilian service of any Federal agency, * * * preference employees whose efficiency ratings are 'good' or better *shall be* retained in preference to all other competing employees * * *." (Emphasis supplied.) The Constitution provides:[4] "The executive Power shall be vested in a President of the United States"; and[5] "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments"; and[6] "he [the President] shall take Care that the Laws be faithfully executed".

The question is how far the Congress can go in limiting the President in his selection of executive officers—purely executive officers. Surely Congress could not forbid him to select persons qualified to help execute a law. Can it then validly direct him to employ the less qualified of several applicant? Or can it require him to remove the better qualified occupants of an executive office?

The question does not concern preferences between equally qualified occupants of offices. And it does not concern "preference points" given to veterans.

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[3] 58 Stat. 390 (1944), as amended, 5 U. S. C. A. § 861.

[4] Art. II, § 1, cl. 1.

[5] *Id.*, § 2, cl. 2.

[6] *Id.*, § 3.

The law is[7] that each department in the executive branch of the government shall establish performance-rating plans for evaluating the work performance of its employees. The law further provides[8] that such plans must provide for ratings representing at least outstanding, satisfactory and unsatisfactory performance. If any employee gets the latter rating he may, after warning, be dismissed. "Satisfactory" corresponds to "good" in the statute before us. So a veteran with a lesser efficiency rating must be retained over a non-veteran employee with a higher rating. I assume that efficiency ratings reflect qualifications for the office. As our appellants put it, so long as a veteran is qualified enough to stay on the payroll he must be retained no matter how much better qualified his fellow-workers are.

The proviso is mandatory. It is an absolute restriction by the Congress upon the President's power of removal of purely executive employees. The fact of being a veteran is wholly unrelated to qualification for office.

The basic authorities are, of course, *Myers* v. *United States*[9] and *Humphrey's Executor* v. *United States*.[10] In the *Humphrey's* case the Supreme Court overruled some of the expressions in the *Myers* case. But it left stark and unmistakable the rule that the removal of purely executive officials is an executive function exclusively, lodged by the Constitution in the President and not subject to interference by the legislative branch of government. The Court rested the difference in result in the two cases upon the difference between the two offices involved. "A postmaster" (the *Myers* case), said the Court in *Humphrey's*,[11] "is an executive officer restricted to the performance of executive functions." The Federal Trade

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[7] 64 Stat. 1098 (1950), 5 U. S. C. A. § 2002.

[8] 64 Stat. 1099 (1950), 5 U. S. C. A. § 2005.

[9] 272 U. S. 52, 71 L. Ed. 160, 47 S. Ct. 21 (1926).

[10] 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869 (1935).

[11] *Id.*, 295 U. S. at 627.

Commission, involved in *Humphrey's*, the Court pointed out, is wholly disconnected from the executive department. The Court in the *Myers* case held invalid as unconstitutional an act of Congress restricting the removal powers of the President in respect to executive officers performing executive functions. There the matter stands, so far as I am able to ascertain. The law is as stated in *Myers*, restricted to purely executive officers by *Humphrey's*. Decisions of the Court of Appeals of New York [12] and of the Supreme Court of Pennsylvania [13] support the views I have outlined.

It may be suggested that if this proviso were found to be unconstitutional the whole Civil Service statutory set-up would be invalid. But those statutes are cast in a different mold, and this fact is one of the noteworthy features of my consideration. The Act of January 16, 1883,[14] authorized the President to appoint a Civil Service Commission. Then it provided that it should be the duty of the Commissioners:

> "FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect * * *.
>
> "SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:
>
> "[A list of eight requirements.]
>
> "THIRD. Said commission shall, subject to the rules that may be made by the President make regulations for, and have control of, such examinations * * *."

The Commission is required to report to the President. Thus the whole act is cast as an aid to the President. It

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[12] *Barthelmess* v. *Cukor*, 231 N. Y. 435, 132 N. E. 140, 142 (1921).

[13] *Commonwealth* v. *Schmid*, 333 Pa. 568, 3 A. 2d 701, 704 (1938).

[14] 22 Stat. 403.

is in no way an impingement upon executive prerogative.

As far as the President's compliance is concerned, two thoughts occur to me. (1) Whether the President by compliance, and thus in theory by his action, could validly effectuate a given result is wholly immaterial to the question whether an act of Congress requiring him to do that act is constitutional. (2) The President could not by complying with it make constitutional an unconstitutional act of Congress.

I would hope the Supreme Court will take this case, which lies in the "field of doubt" as forecast in the *Humphrey's* opinion. Dire results are predicted to us if the present peremptory proviso gradually causes the civilian service of the Government to be manned by veterans of substantially less qualifications than experienced non-veterans.[15]

[15] See, for example, Senate Post Office and Civil Service Committee, *Reduction-in-Force System in the Federal Government*, S. Rep. No. 2102, 82d Cong., 2d Sess. (1952).

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In the Supreme Court of the United States

October Term, 1957

No. [illegible]

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v.

THOMAS S. GATES, Secretary of the Navy, and WILBER M. BRUCKER, Secretary of the Army

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 932

WESLEY D. WHITE, ET AL., PETITIONERS,

v.

THOMAS S. GATES, JR., SECRETARY OF THE NAVY* AND WILBER M. BRUCKER, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. 1a) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 2a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1958. The petition for a writ of certiorari was filed on April 18, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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* On October 1, 1957, the court below entered an order substituting as appellee Thomas S. Gates, Jr., who succeeded Charles S. Thomas as Secretary of the Navy while petitioners' appeal was pending.

QUESTIONS PRESENTED

1. Whether a contention that the Veterans Preference Act is an unconstitutional discrimination against non-veterans presents a substantial question warranting the convening of a three-judge court.

2. Whether petitioners have standing to challenge the Veterans Preference Act on the ground that it violates the constitutional principle of separation of functions by limiting the President's power to control the appointment and dismissal of executive personnel.

STATUTE INVOLVED

Section 12 of the Veterans Preference Act of June 27, 1944, c. 287, 58 Stat. 390, 5 U.S.C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *

STATEMENT

These are actions by non-veteran employees of the Department of the Navy, and non-veterans formerly employed by the Department of the Army, to enjoin the operation of the Veterans Preference Act, Section 12, 58 Stat. 390, 5 U.S.C. 861, on the ground that it is unconstitutional.

Five of the petitioners are presently employed at the Charleston Naval Shipyard. Of this number, only one, Doctor R. Winter, has undergone a change in employment status as a result of the operation of the Veterans Preference Act.[1]

Petitioner George R. Phillips is now employed as an Optical Instrument Maker at the New York Naval Shipyard. He formerly held a position as Planner and Estimator (Optical Instrument Maker) at a higher salary, but he was obliged to take his present position after he received a reduction-in-force notice of separation on February 24, 1956 (R. 27). No claim is made that any veterans preference eligibles enjoyed priority over him on the retention register for his former position.

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[1] On April 3, 1956, petitioner Winter was notified that he would be separated from his employment as Leadingman Shipfitter on July 2, 1956. Fifteen other employees preceded him on the retention register because they were veterans preference eligibles. By exercising "bumping rights", he obtained a position as Shipfitter at a lower salary (R. 23-24).

Of the other petitioners employed at the Charleston Naval Shipyard, Herbert B. Hammond, James Williams and Christopher Wright received notices of reduction in force which were cancelled shortly after issuance (R. 25, 26); and Wesley D. White has never had his employment status questioned by reduction-in-force proceedings which might subordinate him to veterans preference eligibles (R. 28).

Petitioners Joseph A. Murray and Edgar W. Pitts were employed at the Army Springfield Armory, Springfield, Massachusetts. Both were separated from their employment on April 27, 1956, as the result of a reduction in force in which veterans preference eligibles of lesser seniority were retained in similar positions (R. 13, 15, 16).

In February and May, 1956, the petitioners employed in the Charleston and New York Naval Shipyards filed complaints (R. 1, 5, 14, 17) alleging, in substance, (1) that the Secretary of the Navy had directed that non-veterans be subordinated to veterans preference eligibles in reductions in force at the installations where they were employed; (2) that petitioners were threatened with irreparable injury thereby, and (3) that the Veterans Preference Act results in unconstitutional discrimination against them. They sought injunctive relief restraining the Secretary from dismissing them under priorities established by the Veterans Preference Act and, where necessary, orders directing reinstatement to their former positions.

On May 4, 1956, the petitioners who were former employees of the Springfield Armory filed similar complaints against the Secretary of the Army (R. 12), alleging that they had been dismissed while veterans of lesser seniority were retained, and attacking the constitutionality of the Veterans Preference Act. These petitioners likewise sought reinstatement to their positions and an injunction against future dismissal under the Veterans Preference Act.

After filing its answer, the Government moved for summary judgment on the grounds (1) that the complaints failed to state a claim upon which relief could be granted and (2) that petitioners White, Hammond,

Williams and Wright lacked standing since their employment status had not been affected by the operation of the Act. Treating the complaints as an application for the convening of a three-judge court, the District Court held that no substantial question existed as to the constitutionality of the Veterans Preference Act. Accordingly, it dismissed the complaints (Pet. App. 1a, 4. 30-31). The Court of Appeals for the District of Columbia affirmed, Prettyman, J., dissenting (Pet. App. 2a-7a).

ARGUMENT

Both courts below have correctly determined that petitioners' complaints presented no substantial constitutional question and that there was therefore no occasion for convening a three-judge district court. *California Water Service Co.* v. *Redding*, 304 U.S. 252. The lack of substance in petitioners' claim that the Veterans Preference Act unconstitutionally discriminates against them is indicated by prior rulings of this Court and by the long history of veterans preference, which has been part of the federal civil employment system for almost a century. There is also an equal lack of merit to the contention that the Act unconstitutionally limits the powers of the President to appoint and dismiss executive personnel. The Congressional power to control the removal of subordinate employees, such as petitioners, is well established. Further, petitioners point to no presidential directive conferring any rights upon them which conflicts with the Veterans Preference Act; indeed, as it applies to their positions, the President has acquiesced in the operation of the Act.

1. No substantial constitutional question is presented by petitioners' contention that the Veterans Preference

Act unreasonably discriminates against non-veteran employees of the federal Government. In *Gianatasio* v. *Kaplan, et al.*, 284 U.S. 595, this Court dismissed, for want of a substantial federal question, an appeal from a decision by the New York Court of Appeals sustaining the constitutionality of New York's veterans preference law against the contention that it violated the equal protection clause of the Fourteenth Amendment (257 N.Y. 531, 178 N.E. 782). We submit that the disposition of that case is equally dispositive of this case.[2]

Moreover, as the court below noted (Pet. App. 2a), this Court has enforced the Veterans Preference Act in circumstances parallel to those here presented, without any suggestion of constitutional difficulty. In *Hilton* v. *Sullivan*, 334 U.S. 323, the Court had before it the question as to whether (p. 325): "In the treatment of permanent tenure civil service employees, should qualified honorably discharged war veterans, merely because they are such, be retained in preference to non-veterans, even though the nonveterans have served the Government a substantially longer time than the veterans." In answering this question in the affirma-

[2] Petitioners argument that *Gianatasio* should be read in the light of *Barthelmess* v. *Cukor*, 231 N.Y. 435, 132 N.E. 140, misinterprets the latter case. *Barthelmess* was concerned with sections of the New York Constitution which restricted preference to Civil War veterans. Today, New York, like many other states, has a general veterans preference section in its Constitution. N.Y. Const. Art. 5, § 6. Similarly, *Commonwealth ex rel. Graham* v. *Schmid*, 333 Pa. 568, 3 A. 2d 701, quoted in part by petitioners, recognizes that preference for veterans possessing the necessary qualifications is valid under the state constitution's prohibition against special privileges. State cases such as *Barthelmess* and *Schmid* must be read in the light of the particular provisions of the state constitution which they interpret. See Annotation, *Constitutionality of State Veterans' Public Employment Preference Laws*, 161 A.L.R. 494.

tive, the Court reviewed and accepted the long history of federal veterans preference legislation.

That history discloses that preference for veterans in federal employment is a national policy dignified by ninety-two years of usage. Its earliest form dates back to the administration of President Lincoln and it has since developed as an integral part of the merit system. The Civil Service Act of 1883, 22 Stat. 403, which created the modern civil service, reaffirmed in Section 7 the legislative policy of granting employment preference to honorably discharged veterans. The day before the enactment of the Lloyd-LaFollette Act (Act of August 24, 1912, Section 6, 37 Stat. 555), Congress extended the preference accorded veterans. Act of August 23, 1912, § 4, 37 Stat. 360, 413.[3]

Thus, veterans preference is a traditional element in federal civil service policy. It represents the considered and consistent judgment of the Congress that military service to the Republic, especially in time of emergency, deserves special recognition. That judgment has been periodically reviewed by the Congress and veterans employment preference has been reenacted or left undisturbed, after each review, as a suitable civil service policy. The Veterans Preference Act of 1944 is the latest expression of that policy.

Petitioners' contention that the 1944 Act is not the best means of promoting the efficiency of the civil

[3] To this must be added the long line of authority developed in the Court of Appeals for the District of Columbia Circuit, which, by virtue of its location at the seat of Government, has been preeminent in the vindication of veterans employment rights. See, *e.g.*, *Reynolds* v. *Lovett*, 91 App. D.C. 276, 201 F. 2d 181, certiorari denied, *sub nom. Wilson* v. *Reynolds*, 345 U.S. 926; *Hilton* v. *Forrestal*, 83 App. D.C. 44, 165 F. 2d 251, affirmed *sub nom. Hilton* v. *Sullivan*, 334 U.S. 323.

service misconceives the nature of the issue in the courts. The question here is not whether the courts approve the wisdom of the policy Congress has adopted, but whether a substantial constitutional objection can be raised against the power of Congress to adopt that policy. So long as the classification which it has made bears a reasonable relation to the purposes of the legislation, Congress has the broadest discretion to make statutory classifications. *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; *Currin* v. *Wallace*, 306 U.S. 1, 13-14; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585.

Congress cannot, of course, adopt a test forbidden by the Constitution as a standard for public employment. Thus, an employee cannot be discharged for religious reasons (Const., Art. VI, Cl. 3), or for reasons of race. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. But within such limitations Congress and the President have the widest possible latitude to establish standards for the selection and retention of employees. Certainly, the award of veterans preference cannot be compared to the patently arbitrary discrimination condemned in *Wieman* v. *Updegraff*, 344 U.S. 183.

In any event, even if the matter of competence were a proper subject for judicial inquiry, the Veterans Preference Act does not create classifications which permit incompetent veterans to be retained in preference to skilled non-veterans. By the terms of the Act, only veterans with ratings of "good" or better are entitled to preference.[4] In the estimate of Con-

[4] A rating of "satisfactory" corresponds at least to a rating of "good" under the Veterans Preference Act. Performance Rating Act of 1950, § 6, 5 U.S.C. 2005, 64 Stat. 1099. Veterans with ratings below good are given preference only with respect to competing non-veteran employees who have equal or lower efficiency ratings.

gress, qualified veterans, as a group, have performed outstanding public service, and are so entitled to employment preference. This is clearly a rational criterion within the wide range of choice afforded Congress by the Constitution.

2. The Veterans Preference Act does not infringe upon the power of the President to control the appointment and removal of Executive personnel. Petitioners are not officers appointed by the President but are subordinate employees whose appointment may be controlled by Congress. The Constitution (Art. II, § 2, Cl. 2) expressly vests power in the Congress to control the appointment of such subordinate employees. In *United States* v. *Perkins*, 116 U.S. 483, 485, this Court said with reference to that provision: "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." And, in *Myers* v. *United States*, 272 U.S. 52, 161, the Court said that it had "recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal." If there be instances, involving positions unlike petitioners', to which this principle of the *Perkins* and *Myers* cases would not apply, this is obviously not such a case.

In any event, petitioners are in no position to invoke the President's powers over Executive personnel. They can point to no order, directive, or regulation promul-

gated by the President which confers rights upon them that conflict in any way with the mandate of Congress. On the contrary, whatever the result might be if the President were to assert his individual power against Congress, he has here acquiesced in the statutory limitation of the Veterans Preference Act. See *Cole* v. *Young*, 351 U.S. 536, 557, fn. 20.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 ——— 44661 ——— 1476